134-316

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1150.

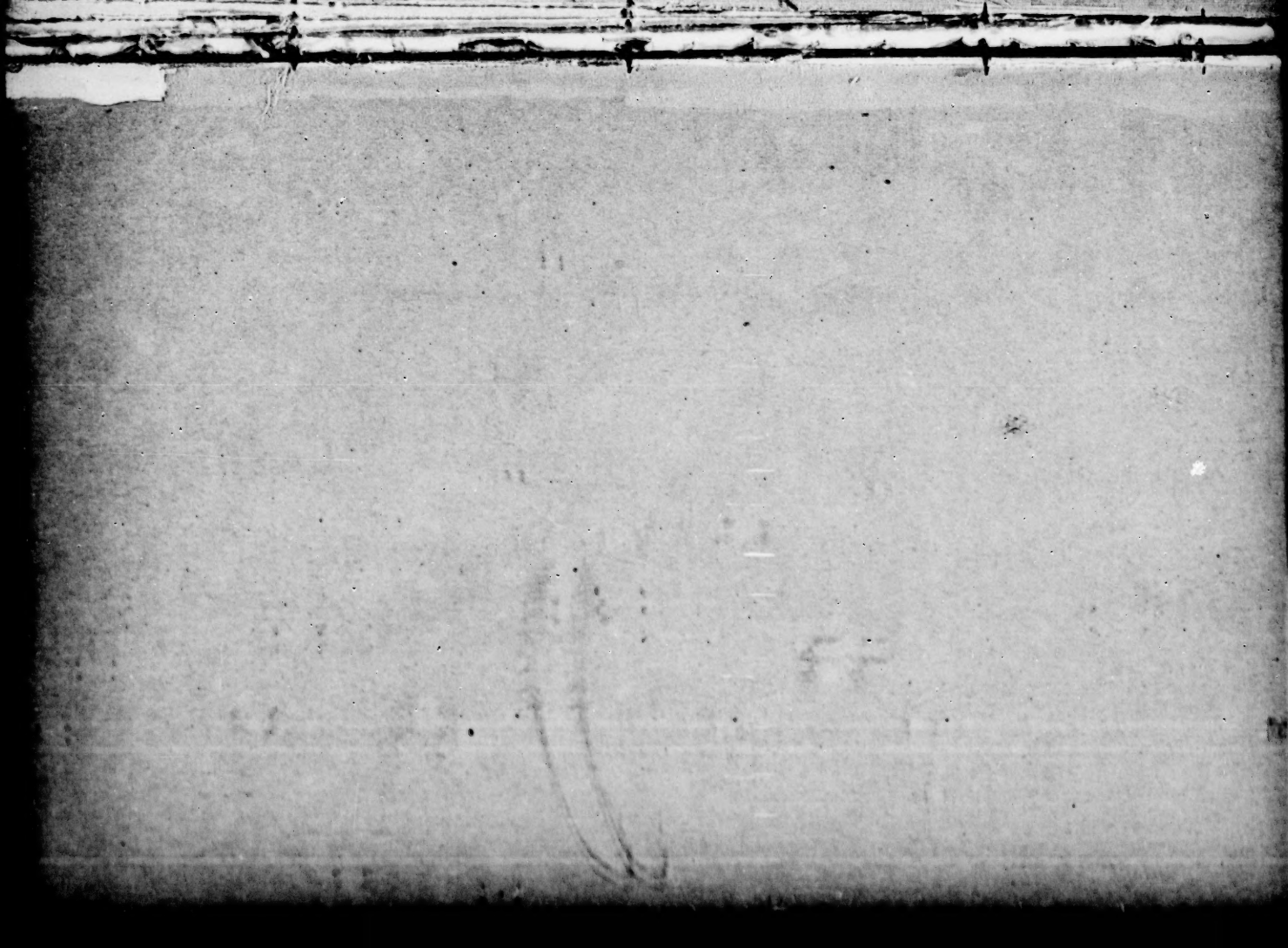
AUGUST F. ARNDT, SR., AUGUST F. ARNDT, JR., AND ROSA REUTHER, PLAINTIFFS IN ERROR,

vs.

NATHAN K. GRIGGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED MAY 20, 1889.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 23, 1889.

1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, and the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the May term, A. D. 1888.

Be it remembered that on the 20th day of December, 1887, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

NATHAN K. GRIGGS
vs.
AUGUST F. ARNDT, AUGUST F. ARNDT, Jr., and ROSSA REUTHER. } Petition.

The plaintiff avers—

1. That he is a resident and citizen of the State of Nebraska.

2. The defendants, August F. Arndt and August F. Arndt, Jr., are residents and citizens of the State of Nebraska, and that the defendant, Rossa Reuther, is a citizen and resident of the State of Iowa.

3. That the value of the property involved in this controversy and described in the fourth paragraph of this petition and the amount in dispute in this action exceed $4,000.00, exclusive of interest and costs.

4. That the plaintiff is the owner and entitled to the immediate possession of the following-described real estate, situate in Lancaster county, Nebraska, to wit:

2 The south half of the southeast quarter of section four (4) and the north half of the northeast quarter of section nine (9), all in township eleven (11) north, of range eight (8) east; and that his title to said premises and his right to the possession thereof are based upon the following facts:

December 6th, 1860, the said premises were conveyed to one Michael Hurley by the Government of the United States.

November 16th, 1886, the said premises were duly conveyed to this plaintiff by said Michael Hurley, and plaintiff is still the legal owner thereof.

5. That the defendants, August F. Arndt, Jr., and Rossa Reuther, claim to be the owners of said premises, and the defendants herein are in possession thereof and refuse to allow plaintiff to take or have possession of the same, basing their claim to such title and possession upon the following facts, viz:

February 2, 1878, the treasurer of Lancaster county, Nebraska, made a pretended tax deed to one Charles L. Flint for the said premises, which said pretended conveyance was and is void and conferred no title whatever to said premises upon the said Flint.

January 14, 1881, the treasurer of Lancaster county, Nebraska, made a pretended tax deed to one J. B. Upham for the said premises, which said pretended conveyance was and is void and conferred no title whatever to said premises upon the said Upham.

May 3, 1881, the said J. B. Upham quitclaimed all his interest in said premises to the said Charles L. Flint.

March 27, 1882, the said lands being then vacant and unoccupied lands, the said Charles L. Flint commenced an action against
3 the above-named Michael Hurley to quiet his, said Flint's, title to said premises, as provided by section 57 of chapter 73 of the Compiled Statutes of Nebraska, and thereupon, in order to procure service upon the said Hurley, made affidavit that he, the said Hurley, was a non-resident of the State of Nebraska, whereupon service upon him, the said Hurley, was had by publication in the manner provided by sections 77 to 80, inclusive, of the Code of Civil Procedure of the State of Nebraska.

June 16, 1882, the said district court of Lancaster county ordered, adjudged, and decreed that the title and possession of the said premises were in the said Charles L. Flint, and further decreed that the title of said Flint to said premises should be quieted as against said Hurley and all persons claiming through or under him, and forever enjoined said Hurley and all persons claiming through or under him from setting up any claim to said premises *or any claim to said premises* or any part thereof adverse to the title and possession of the said Flint, or in any manner interfering with his use and enjoyment of the same. A certified copy of the said proceedings of said Flint against said Hurley is hereto annexed, marked "A," and made part of this petition.

The said Hurley has never been a citizen or resident of the State of Nebraska, and no service of summons was ever made upon him in said action so brought against him by the said Flint, and had no actual notice of the pendency of the said action, the only service made upon him in said proceeding being a constructive one by publication in a newspaper published in said Lancaster county, Nebraska, as appears in said Exhibit "A," hereto annexed, and the only jurisdiction ever acquired over him in said action being by the publication and constructive service aforesaid.

4 The said pretended decree appearing in said Exhibit "A" is void for the want of jurisdiction of the court to render the same, and is in contravention of the laws of the United States providing that no person shall be deprived of his property except by due process of law, and the enforcement of said decree would be to deprive said Hurley and plaintiff as his grantee of the property in question without due process of law.

July 1, 1885, said Flint conveyed whatever interest in or title he had to said premises to Ricketts and Wilson.

August 14, 1885, said Ricketts and Wilson conveyed whatever interest in or title they had to said premises to defendant, August F. Arndt.

August 14, 1885, said August F. Arndt conveyed whatever interest in or title he had to said premises to defendant, August F. Arndt, Jr.; and—

August 14, 1885, said August F. Arndt, Jr., conveyed whatever interest in or title he had to the said premises to defendant, Rossa Reuther; and—

6. That the defendant, Rossa Reuther, claims to be the legal owner of the premises in controversy under and through the said proceedings and decree appearing in Exhibit "A," hereto annexed, and the defendants herein are in the possession of said premises and refuse to surrender the same to plaintiff, claiming the right to such possession by force and virtue of such proceedings and decree and the said several conveyances made by the said Flint and his grantees hereinbefore set forth.

Wherefore plaintiff prays judgment for the delivery of the possession of the premises in controversy and the costs of this suit.

J. A. SMITH &
GRIGGS & RINAKER,
Att'ys for Plaintiff.

5 STATE OF NEBRASKA, } ss:
Gage County, }

Nathan K. Griggs, being sworn, says that he is the plaintiff in the above-entitled action, and that the facts stated in the foregoing petition are true as he verily believes.

NATHAN K. GRIGGS.

Subscribed in my presence and sworn to before me this 23rd day of December, 1887.

[SEAL.] J. E. COBBEY,
Notary Public.

Attached to said petition is Exhibit A, in words and figures following, to wit:

3223, K, 123. FLINT *vs.* HARLEY, &c.

Pleas before the Hon. S. B. Pound, judge of the district court of the second judicial district, held within and for the county of Lancaster and State of Nebraska, at the May, A. D. 1882, term of said court, begun and held, in the city of Lincoln, in the county of Lancaster and State aforesaid, on the 16th day of June, A. D. 1882 (that being the 23rd day of the May, A. D. 1882, term of said court)—were present, Hon. S. B. Pound, judge; Gran Ensign, sheriff, and A. D. Burr, clerk—were had and done, amongst other proceedings, the following, to wit:

In the District Court of Lancaster County, Nebraska.

CHARLES L. FLINT, Plaintiff,
vs.
MICHAEL HARLEY and MICHAEL HURLEY,
Defendants.

Petition in Equity. Petition filed March 27, 1882.

6 Your petitioner, Charles L. Flint, respectfully shows to this honorable court that he is the absolute owner in fee simple of the following-described real estate, situated in Lancaster

county, in the State of Nebraska, to wit: The north half of the northeast quarter of section nine, township eleven north, of range eight east, and the south half of the southeast quarter of section four, in township eleven north, of range eight east, and is in possession thereof; that he holds the same by virtue of certain tax deeds executed by the county treasurer of said county; and, further, that the said lands were subject to taxation for the year 1874, and were duly and legally assessed and valued for taxation for said year; that at the proper time said taxes were duly levied upon said lands, and the same were not paid before the same became delinquent, or at any other time; that the county treasurer was unable to collect the same except by said [sale] of the said premises; that on the 15th day of October, 1875, according to law in such cases made and provided, C. C. White, the county treasurer of said county, sold the whole of said land to your petitioner for the taxes, interest, and charges then due thereon, being $47.38—that is to say, the sum of $21.68 for the said north half of the northeast quarter of section nine, township eleven north, of range eight east, and the sum of $25.70 for the said south half of the southeast quarter of section four of township eleven north, of range eight east; that the said defendant and all other persons wholly failed and neglected to redeem said tracts of lands or either of them or any part thereof from said sale before the time allowed by law for redemption had expired, or at any time since, and that, upon proper proofs of service of all necessary notices and all other acts required to be performed by your petitioner being duly filed, the county treasurer of said county,
7 on the fifth day of February, 1878, conveyed said lands to your petitioner herein, according to law in such cases made and provided, your petitioner paying the costs of procuring said deed, amounting to $——, on each of said tracts at the date of said deeds, which said deeds were, on the 8th day of February, 1878, duly recorded in the clerk's office of said county; and your petitioner further shows that he has paid all the taxes levied on said lands since the year 1874, to the amount of $——, except the taxes for the year 18—, for the payment of which said lands were sold to one J. B. Upham, and that after said Upham received a deed for said lands he, for a valuable consideration, sold and conveyed all his right and his interest therein to the plaintiff herein.

3223, K, 123. FLINT vs. HARLEY, &c.

That plaintiff is credibly informed and believes that each of the said defendants claims some title, estate, interest in, or some lien or claim upon the said lands by patent from the United States or derived grantors who were the original patentees of said lands or by virtue of some pretended tax deed or deeds; but the plaintiff avers that the said estate of the defendants was divested by the said tax deeds, and that the said claims and pretenses are unjust, inequitable, and unfounded and tend to the manifest injury of the plaintiff and to disturb him in the enjoyment of this said estate and to prevent an advantageous sale thereof.

He therefore brings this suit to quiet and determine his title to said lands, and prays that his estate may be established against the adverse claims of the said defendants; that his title thereto
8 may be quieted and determined as against each and all of said defendants and all persons claiming through or under them or either of them, and that they and each of them and all persons claiming through or under them or any of them be forever barred, estopped, and foreclosed from setting up any title, estate, or lien in or to said lands or any part thereof at law or in equity, and for such further and other relief as to the court may seem just and equitable and for his costs; or if for any reason this court should hold that said tax deeds are invalid, illegal, or void your petitioner prays that he be given and awarded a first lien on each of the said tracts paramount and superior to all claims, interest, lien, or estate of the said defendants or any of them for the several amounts paid thereon as taxes and costs, as above set forth, with interest on the said several sums paid before the issuance of deed at the rate of forty per cent. per annum from the dates of the several payments thereof to February 5, 1878, and that on the sum total thereof and on all taxes paid subsequent to the deed, with the costs of the deeds, $2.00, added, the rate of 20 per cent. per annum from the date of the deeds until the sums shall be paid and satisfied and his costs in this behalf expended, and for such other and further relief as to this court may seem just and equitable and for the quieting of the title to the said lands.

RICKETTS & WILSON,
Attorneys for the Plaintiff.

STATE OF NEBRASKA, }
Lancaster County, } *ss:*

H. H. Wilson, being first duly sworn, deposes and says that he is one of the attorneys of the plaintiff in this action; that the said plaintiff is a non-resident of the State of Nebraska and is now
9 absent therefrom; that the affiant knows the contents of the foregoing petition, and that the matters and facts therein set forth are true, as he verily believes.

H. H. WILSON.

Sworn to before me and subscribed in my presence on this 23rd day of March, 1882.

[SEAL.] W. J. WEBER,
Notary Public.

3223, K, 123. FLINT *vs.* HARLEY.

Summons. Filed Mar. 30, '82.

THE STATE OF NEBRASKA, }
Lancaster County, } *ss:*

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify Michael Harley and Michael Hurley, defendants, that they have been sued by Charles L. Flint,

plaintiff, in the district court of the second judicial district in and for the said county of Lancaster, and that unless they answer, by the 1st day of May, A. D. 1882, the petition of said plaintiff filed against them in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 10th day of April, A. D. 1882.

Witness my hand and seal of said court, at Lincoln, this 27th day of March, A. D. 1882.

[SEAL.]

A. D. BURR, *Clerk*,
By LYMAN WOOD, *Deputy*.

Endorsed: Chas. L. Flint, plaintiff, *vs.* Michael Harley *et al.* Summons. District court. No. 3223, K, page 123. Returnable April 10, 1882. Ricketts & Wilson, plaintiff's attorney. Filed Mar. 30, 1882. A. D. Burr, clerk.

10 THE STATE OF NEBRASKA, } ss:
Lancaster County, }

After making diligent search I cannot find the within-named Michael Harley and Michael Hurley in my bailiwick.

Fees, 25 cts.

GRAN ENSIGN, *Sheriff*,
By S. M. MELICK, *Deputy*.

Affidavit for Service by Publication. *Filed Mar.* 31, '82.

In the District Court for Lancaster County, Nebraska.

STATE OF NEBRASKA, } ss:
Lancaster County, }

CHARLES L. FLINT
against
MICHAEL HARLEY and MICHAEL HURLEY. }

A. C. Ricketts, being first duly sworn, on his oath says he is one of the duly authorized attorneys of said plaintiff; that as such plaintiff he, on the 27th day of March, 1882, filed the plaintiff's petition in the district court for said county and State against said Michael Harley and Michael Hurley, the object and prayer of said petition being to quiet the title and declare the same in the plaintiff, Charles L. Flint, of the north half of the northeast quarter of section number nine (9) and the south half of the southeast quarter of section number four (4), all of township number eleven north, of range number eight east, of the 6th P. M., situate in Lancaster county, Nebraska. Plaintiff alleges that said premises were subject to taxation for the year 1874; that they were duly assessed and taxes levied thereon; that the same became delinquent, and the treasurer of said county was unable—

11 3223, K, 123. FLINT *vs.* HARLEY.

to collect the same; that on the 15th day of October, 1875, the treasurer of said county, C. C. White, sold the first above-described premises to plaintiff for $21.68 and the second above-described premises to plaintiff for $25.70; that the defendant and all other persons failed to redeem said premises from said sale at any time prior to the expiration of redemption or any time thereafter; that on the 5th day of February, 1878, the treasurer of said county, said sale being still unredeemed, issued his deed therefor to this plaintiff, which plaintiff immediately placed of record in said county, and thereupon claims title to said premises; that he has paid all taxes upon said premises since said sale; that defendants and each of them claim some interest in or to said premises by virtue of patent from the United States, or through or under such patent has, as affiant is advised.

Plaintiff asks that said defendants may be estopped, barred, and forever foreclosed from setting up any title, estate, or lien in or to said lands; that the title to said premises may be declared and quieted in said pl'ff as against said defendants and each of them, and for such other, further, and different relief as equity may require.

Affiant further says that said defendants are non-residents of Nebraska, and service of summons cannot be made within said State upon either of them. Wherefore plaintiff prays for service upon said defendants by publication.

A. C. RICKETTS.

Subscribed in my presence and sworn to before me this 29th day of March, 1882.

[SEAL.] L. W. BILLINGSLEY,
Notary Public.

12 *Journal "H," Page* 499.

CHARLES L. FLINT
vs.
MICHAEL HARLEY & MICHAEL HURLEY. } 3223, K, 123.

Now comes the plaintiff, by his attorneys, and the defendants, each and every of them, being in default for want of answer and demurrer, the court finds the allegations of the petitioner are confessed by them to be true.

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Affidavit of Publication.

H. D. Hathaway, being duly sworn, deposes and says that he is one of the publishers of the Nebraska State Journal, a newspaper published daily and weekly and of general circulation in the county of Lancaster and State of Nebraska, and that the attached notice was

published in said newspaper for four weeks consecutively, the first insertion having been on the 4th day of April, 1882.

H. D. HATHAWAY.

Subscribed in my presence and sworn to before me this 25th day of May, A. D. 1882.

[SEAL.] JAS. C. LEONARD,
Notary Public.

Printer's fees, $10.00, p'd by pl'ff. Proof of publication. Filed May 25, 1882.

3223, K, 123. FLINT *vs.* HARLEY, &c.

Notice.

Michael Harley and Michael Hurley, defendants, will take notice that on the 27th day of March, 1882, Charles L. Flint, plaintiff herein, filed his petition in the district court of Lancaster
13 county, Nebraska, against said defendants, the object and prayer of which are to quiet and declare in the plaintiff the title to the following-described premises, to wit: The north half of the northeast quarter of section (9) and the south half of the southeast quarter of section four (4), all in town. number eleven (11), of range number eight (8), in Lancaster county, Nebraska, by virtue of tax deeds duly and legally and regularly issued to said plaintiff by the treasurer of said Lancaster county on the 5th day of February, A. D. 1878, in pursuance of sale certificates issued by the treasurer of said county of the date of October 15th, 1875, on the sale of said premises for the taxes thereon duly levied for the year 1874, which said deeds were filed for record in the office of the clerk of said county on the 8th day of February, 1878, as against any lien, claim, title, demand, or interest of the said defendants or either of them in or to said premises or any part thereof; and plaintiff prays that his estate in said premises may be established against the adverse claims of said defendants, and that his title thereto may be quieted and determined as against each of said defendants, and for such other relief as equity and good conscience may require. You are required to answer said petition on or before the 22nd day of May, 1882.

CHARLES L. FLINT,
By RICKETTS & WILSON,
His Attorneys.

Journal Entry, Page 600.

CHARLES L. FLINT
vs.
MICHAEL HARLEY and MICHAEL HURLEY. } 3223, K, 123.

This cause came on to be heard upon the pleadings and proofs adduced, and was tried to [by] the court; on consideration
14 whereof the court find on the issues joined for the plaintiff, and, further, at the time of bringing this action the said

plaintiff was in possession of the real property described in the petition, and that he has the legal estate in and is entitled to the possession of the same; that neither the defendants nor any one of them have any estate in or are entitled to the possession of said real estate or any part thereof, and that the plaintiff ought to have his title and possession quieted as against each and every one of said defendants, as prayed for in his petition.

It is therefore ordered, adjudged, and decreed that the title and possession of the said Charles L. Flint to all and singular the premises in the petition described, to wit, the north half of the northeast quarter of section nine, township eleven north, of range eight east, 6th P. M., and the south half of the southeast quarter of section four, in township eleven north, of range eight east, in Lancaster county, Nebraska, be, and the same hereby are, quieted as against the defendants and each and every one of them and all persons claiming under them or any of them; and said defendants and each and every one of them and all persons claiming under them are hereby forever enjoined from setting up any claim to said premises or any part thereof adverse to the title and possession of said Charles L. Flint thereto or in any manner interfering with his use and enjoyment of the same. It is further ordered that the said plaintiff recover from the said defendants his costs herein expended, taxed at $22.10.

S. B. POUND, *Judge.*

15 *Certificate.*

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I, E. R. Sizer, clerk of the district court, second judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the complete record in a cause in said court wherein Charles L. Flint is plaintiff and Michael Harley *et al.* are defendants, as the same appears fully upon Complete Record "Q," commencing at page 525 of the records of said court, and now in my charge remaining as clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Lincoln, this 15th day of October, A. D. 1887.

[SEAL.] E. R. SIZER, *Clerk D. C.*

Fees, $3.00.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 132, M. Nathan K. Griggs *vs.* August F. Arndt, August F. Arndt, Jr., and Rossa Reuther. Petition. Filed Dec. 29, 1887. Elmer D. Frank, clerk. J. A. Smith and Griggs & Rinaker, att'ys for plaintiff.

Thereupon, afterwards, to wit, on the 25th day of February, 1888, separate plea in abatement was filed in said case; which plea is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

NATHAN K. GRIGGS, Plaintiff,
vs.
AUGUST F. ARNDT, AUGUST F. ARNDT, Jr., and ROSSA REUTHER, Defendants.

16 *Separate Pleas of August F. Arndt and August F. Arndt, Jr.*

Come now the defendants, August F. Arndt and August F. Arndt, Jr., and for their separate pleas to the plaintiff's petition filed herein say that they are citizens and residents of Lancaster county and State of Nebraska, and were such citizens and residents at the time of the commencement of this action; that the plaintiff, Nathan K. Griggs, is a citizen and resident of Gage county, Nebraska, and was such citizen and resident at the time of the commencement of this action; and the defendants further say that this court is without jurisdiction to try the issues raised in the plaintiff's petition against these defendants.

Wherefore these defendants pray that said cause may be dismissed for want of jurisdiction, and these defendants go hence without day and recover their costs.

WALTER J. LAMB,
Defendants' Att'ys.

DISTRICT OF NEBRASKA, *ss:*

August F. Arndt, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing separate plea, and believes the matters and facts therein contained to be true.

AUGUST F. ARNDT.

Subscribed in my presence and sworn to before me this 23rd day of February, 1888.

[SEAL.]

R. S. MOCKETT,
Notary Public.

Upon the back of said plea appear endorsements in words and figures following, to wit: No. 132, M. Nathan K. Griggs, pl'ff, *vs.* August F. Arndt *et al.*, def'ts. Separate plea in abatement. Filed Feb. 23, 1888. Elmer D. Frank, clerk. Walter J. Lamb, att'y for def'ts, Arndt & Arndt.

17 Thereupon, afterwards, at the May term of said court, on the 7th day of May, 1888, the following proceedings were had and done in said cause, as appears of record on folio 744, Journal "M" of said court, to wit:

NATHAN K. GRIGGS
vs.
AUGUST F. ARNDT *et al.* } 132, M.

This cause, coming on for hearing on the plea in abatement filed

herein, was argued and submitted to the court on behalf of said defendants; whereupon the court takes the same under consideration.

Thereupon, afterwards, to wit, on the 15th day of May, 1888, demurrer to plea in abatement was filed in said case; which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

NATHAN K. GRIGGS *vs.* AUGUST F. ARNDT *et al.* } Demurrer to Plea of August F. Arndt and August F. Arndt, Jr.

Comes now the plaintiff, Nathan K. Griggs, and demurs to the defendants' plea in abatement filed in this action for the reason that the said plea does not state facts sufficient to entitle defendants to the relief prayed, and for the reason that said plea does not state facts sufficient to show a want of jurisdiction of this court to try the issues raised in plaintiff's petition against said defendants.

J. A. SMITH AND
GRIGGS & RINAKER,
Att'ys for Pl'ff.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 132, M. Nathan K. Griggs *vs.* August F. Arndt *et al.* Demurrer to plea in abatement.
18 Filed May 15, 1888. Elmer D. Frank, clerk. Griggs & Rinaker, att'ys for pl'ff.

Thereupon, afterwards, to wit, on [at] the said May term of said court, on the 19th day of June, 1888, the following proceedings were had and done in said cause, as appears of record on folio 876, Journal "M" of said court, to wit:

NATHAN K. GRIGGS *vs.* AUGUST F. ARNDT *et al.* } 132, M.

This cause having been heard on the plea in abatement of the defendants heretofore filed herein, the court, after careful consideration thereof and being fully advised in the premises, doth now, on this day, order and adjudge that said plea in abatement be, and the same is hereby, overruled. Defendants are ruled to answer in twenty days and plaintiff to reply in thirty days. Cause continued.

Thereupon, afterwards, to wit, on the 19th day of June, 1888, demurrer was filed in said case; which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

NATHAN K. GRIGGS, Plaintiff,
vs.
AUGUST F. ARNDT and AUGUST F. ARNDT, Jr., *et al.*, Defendants. } Demurrer.

Come now the defendants, August F. Arndt and August F. Arndt, Jr., and for themselves demur to the plaintiff's petition herein for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants.

W. J. LAMB,
Attorney for Defendants.

19 Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 132, M. Nathan K. Griggs vs. August F. Arndt *et al.* Demurrer to petition. Filed Jun- 19, 1888. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, attorneys for defendants.

Thereupon, afterwards, at the November term of said court, on the 13th day of November, 1888, the following proceedings were had and done in said cause, as appears of record on folio 76, Journal "N" of said court, to wit:

NATHAN K. GRIGGS
vs.
AUGUST F. ARNDT, AUGUST F. ARNDT, Jr., and ROSSA REUTHER. } 132, M.

This cause, coming on for hearing on the demurrer of the defendants to the petition of the plaintiff, was argued to the court by Messrs. Griggs & Rinaker in support thereof and by Walter J. Lamb in opposition thereto. The court, on consideration thereof, overrules the said demurrer; and thereupon, the defendants not desiring to plead further, but standing on their said demurrer, the court finds upon the petition that the said pl'ff is the owner of and entitled to the immediate possession of the following premises, described in the said petition herein, to wit: The south half of the southeast quarter of section four (4) and the north half of the northeast quarter of section nine (9), all in township eleven (11) north, of range eight (8) east, in Lancaster county, Neb., and that said plaintiff was at the date of the commencement of this suit and now is the owner thereof. It is therefore considered, ordered, and adjudged by the court that said plaintiff have and recover of and from said defendants the possession of said premises, together with his costs herein ex-
20 pended, taxed at — dollars, and that a writ of possession and execution issue therefor.

And the judges of said court, being divided in opinion on certain points, certify such division to the Supreme Court of the United States in the manner following—that is to say:

In the Circuit Court of the United States, District of Nebraska.

NATHAN K. GRIGGS, Plaintiff,
vs.
AUGUST F. ARNDT, Sr., AUGUST ARNDT, Jr., ROSSA REUTHER, Defendants.

This cause came on for hearing before the Honorable David J. Brewer, circuit judge, and Elmer S. Dundy, district judge, on this 12th day of Nov., 1888, upon the demurrer of the defendants to the petition of the plaintiff filed herein, and said cause is argued by counsel and submitted to the court; and thereupon, it appearing to the court from the petition of plaintiff and defendants' demurrer thereto that Dec. 6th, 1860, the premises in controversy, to wit, 160 acres of land in Lancaster county, Nebraska, were conveyed to one Michael Harley by the Government of the United States.

November 16th, 1886, said premises were duly conveyed to plaintiff in this action by said Michael Harley, and said plaintiff has not since conveyed said premises to any other person.

Feb'y 3d, 1878, the treasurer of Lancaster county, Nebraska, made a pretended tax deed of said premises to Charles L. Flint,
21 which said pretended conveyance was and is void and conveyed no title to said Flint.

Jan. 14th, 1881, the treasurer of said county made a pretended tax deed to one J. B. Upham for the said premises, which said pretended tax deed was and is void and conveyed no title to said Upham.

May 3d, 1881, said Upham quitclaimed his interest in said premises to said Flint. March 27, 1882, the said premises being vacant and unoccupied lands, the said Charles L. Flint commenced an action against the above-named Michael Hurley to quiet his, said Flint's, title to said premises, as provided by sec. 57 of chapter 73 of the Compiled Statutes of Nebraska, and thereupon, in order to procure service upon said Hurley, made affidavit that said Hurley was a non-resident of the State of Nebraska; whereupon service on said Hurley was had by publication in the manner provided by sections 77 to 80, inclusive, of the Code of Civil Procedure of the State of Nebraska.

June 16, 1882, the said district court of Lancaster county, Nebraska, ordered, adjudged, and decreed that the title and possession of the said premises were in the said Charles L. Flint, and further decreed that the title of said Flint to said premises should be quieted as against said Hurley and all persons claiming through or under him and forever enjoining the said Hurley and all persons claiming through or under him from setting up any claim to said premises or any part thereof adverse to the title or possession of said Flint or in any manner interfering with his use or enjoyment of the same.

Said decree is still unreversed.

Said Hurley has never been a citizen or resident of Ne-

braska, and no service of summons was ever made upon him
22 in said action so brought against him by said Flint, and he had no actual notice of the pendency of the said action, the only service made upon him in said proceeding being a constructive one, by publication in a newspaper published in said Lancaster county, Nebraska, and the only jurisdiction acquired over him in said action being by the publication and constructive service aforesaid.

July 1st, 1885, said Flint conveyed whatever interest he had in said premises to Ricketts & Wilson. August 14th, 1885, said Ricketts & Wilson conveyed whatever interest in or title they had to said premises to defendant, August F. Arndt, Sr. Aug. 14, 1885, said August F. Arndt, Sr., conveyed whatever interest in or title he had to said premises to said August F. Arndt, Jr. Aug. 14, 1885, said Aug. F. Arndt, Jr., conveyed whatever interests in or title he had in said premises to defendant, Rosa Reuther.

Plaintiff claims to be the owner of the premises under the deed from Michael Hurley, and the defendants claim to be the legal owners of the premises in controversy and are in possession thereof under and through the said proceedings and decree aforesaid and conveyances subsequent thereto aforesaid, and refuse to surrender possession to said plaintiff.

And thereupon the said judges divided in opinion upon the following questions of law arising in said cause on the consideration of the said demurrer to the plaintiff's said petition, and the same, upon request of the attorneys of the respective parties in said cause, are now certified to the Supreme Court of the United States for decision:

First. Is the above decree rendered as aforesaid against said Michael Hurley and in favor of said Charles L. Flint valid as against the plaintiff in this action?

Second. Is a decree in the State courts of Nebraska under
23 the statutes of that State on service by publication alone, where there is no appearance of the defendant to the action, valid, when rendered in an action quieting the title to lands situated in said State, when such decree is drawn in question in the Federal courts in that State?

Third. Is a decree rendered in the courts of the State of Nebraska in an action to quiet the title to real estate situate in said State on service by publication alone, where there is no appearance of defendant in the said action or knowledge of the pendency of the said action on his (defendant's) part and where the land in question at the commencement and during the pendency of said action is vacant and unoccupied, valid when drawn in question in the Federal courts of that State?

Fourth. Is a decree quieting the title to real estate in Nebraska in an action prosecuted under the statutes of Nebraska above referred to to be treated and regarded as a decree *in rem* when drawn in question in the Federal court?

Fifth. Is an action under the statutes of Nebraska to quiet the title to real estate in that State to be regarded as an action *in per-*

sonam or an action *in rem* when drawn in question in the Federal court?

(S'gd) DAVID J. BREWER,
Circuit Judge.

(S'gd) ELMER S. DUNDY,
District Judge.

Thereupon, afterwards, to wit, on the 13th day of November, 1888, a writ of error was allowed in said case, and on the 16th day of November a citation issued thereon, of which said writ of error and citation the following are the originals:

24 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Nathan K. Griggs, plaintiff in said cause, and August F. Arndt, Sr., August F. Arndt, Jr., and Rosa Reuther, defendants therein, a manifest error hath happened, to the great damage of the said defendants therein in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall [should] be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this thirteenth day of October, 1888.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
D. J. BREWER,
Circuit Judge.

[Endorsed:] No. 132, M. United States circuit court, district of Nebraska. August F. Arndt, Sr., August F. Arndt, Jr., Rosa Reuther *vs.* Nathan K. Griggs. Writ of error. Filed Nov. 13, 1888. Elmer D. Frank, clerk.

25 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Nathan K. Griggs, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein August F. Arndt, Sr., August F. Arndt, Jr., and Rosa Reuther are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the supreme court of the United States, at Omaha, this thirteenth day of November, 1888.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

D. J. BREWER, *Circuit Judge.*

25½ [Endorsed:] No. 132, M. United States circuit court, district of Nebraska. August F. Arndt, Sr., August F. Arndt, Jr., and Rosa Reuther *vs.* Nathan K. Griggs. Citation. Filed Nov. 16, 188–. E. D. Frank, clerk.

I hereby waive service of this citation and enter my voluntary appearance in said cause in the Supreme Court.

Dated —— —.

——— ———.

I accept service of the within writ and enter voluntary appearance in this cause in the Supreme Court of the United States.

Given under my hand this 16th day of November, 1888.

NATHAN K. GRIGGS,
Defendant in Error.

26 Thereupon, afterwards, to wit, on the said 16th day of November, 1888, a bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Arnott C. Ricketts and Henry H. Wilson, are held and firmly bound unto Nathan K. Griggs in the full and just sum of one thousand dollars, to be paid to the said Nathan K. Griggs, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States for the

district of Nebraska, in a suit depending in said court between Nathan K. Griggs, plaintiff, and August F. Arndt, Sr., August F. Arndt, Jr., and Rosa Reuther, defendants, judgment was rendered against said defendants, and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Nathan K. Griggs, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said August F. Arndt, Sr., August F. Arndt, Jr., and Rosa Reuther shal prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. C. RICKETTS.
H. H. WILSON.

27 Approved by—
D. J. BREWER,
Circuit Judge.

Nov. 16, 1888.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 132, M. United States circuit court, district of Nebraska. August F. Arndt, Sr., August F. Arndt, Jr., Rosa Reuther *vs.* Nathan K. Griggs. Bond. Filed Nov. 16, 1888. Elmer D. Frank, clerk.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 26, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk in the case of August F. Arndt, Sr., August F. Arndt, Jr., Rosa Reuther, *vs.* Nathan K. Griggs, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 19th day of March, A. D. 1888.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1150. August F. Arndt, Sr., August F. Arndt, Jr., & Rosa Reuther, plaintiffs in error, *vs.* Nathan K. Griggs. Filed May 20, 1889.

Office Supreme Court U. S.
FILED.
DEC 14 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT,

OF THE UNITED STATES.

October Term, 1889.

AUGUST F. ARNDT, SR., et al.,
Plaintiffs in Error.

vs.

NATHAN K. GRIGGS,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
Attorneys for Plaintiffs in Error.

Globe Pub. Co., Printers, Windsor Hotel Block.

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Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

On the 20th day of December, 1887, defendant in error filed in the Circuit Court of the United States for the District of Nebraska, his petition (Record p. 1) alleging that he is the owner and entitled to the immediate possession of the south half of the south east quarter of section four and the north half of the north

east quarter of section nine in township eleven of range eight in Lancaster county, Nebraska, and that said premises were conveyed to one Michael Hurley, Dec. 6, 1869, by the United States, and by said Hurley to defendant in error Nov. 16, 1886. And that the plaintiffs in error base their claim to the title of said premises on a decree of the district court of Lancaster county, Nebraska, of the date of June 16, 1882, quieting the title to said premises in Charles L. Flint, through whom plaintiffs in error claim by mesne conveyances, against said Hurley and all persons claiming through or under him. That said Hurley has never been a citizen or resident of Nebraska and the only service on him in said action was constructive service by publication.

On the 25th day of February, 1888, the plaintiffs in error filed a plea in abatement (Record p. 10) alleging that defendant in error and plaintiffs in error were all at the commencement of this action and still are residents and citizens of Nebraska.

On the 15th day of May, 1888, defendant in error filed a general demurer (Record p. 11) to the plea in abatement.

On the 19th day of June, 1888, the court overruled said plea in abatement and required plaintiffs in error to plead to the petition (Record p. 11).

On the 19th day of June, 1888, the plaintiffs in error filed a general demurer (Record p. 12) to the petition.

On November 13, 1888, the court overruled the demurer and the plaintiffs in error electing to stand on the same judgment was entered (Record p. 12) for the defendant in error. The judges being divided in opinion on certain points duly signed a certificate of

such division of opinion (Record pp. 12, 13, 14 and 15) upon which plaintiffs in error bring the case to this court by writ of error (Record p. 15); citation issued and service thereof accepted by defendant in error Nov. 16, 1888. (Record p. 16).

ASSIGNMENT OF ERROR.

FIRST. The court erred in holding that the decree in the case of Charles L. Flint vs Michael Hurley, et al., in the district court of Lancaster county, Nebraska, quieting the title to the demanded premises was invalid, null and void as against the defendant in error.

SECOND. The court erred in holding that a decree in the state courts of Nebraska under the statutes of that state on service by publication alone, where there is no appearance of the defendant to the action, is void, when rendered in an action quieting the title to lands situated in said state, when such decree is drawn in question in the Federal courts in that state.

THIRD. The court erred in holding that a decree in the courts of the state of Nebraska in an action to quiet the title to real estate situated in said state on service by publication alone, where there is no appearance of defendant in the said action, or knowledge of the pendency of the said action on his (defendant's) part, and where the land in question, at the commencement and during the pendency of said action, is vacant and unoccupied, is invalid when drawn in question in the Federal courts of that state.

FOURTH. The court erred in holding that a decree quieting the title to real estate in Nebraska in an action prosecuted under the statutes of Nebraska above referred to is not to be treated and regarded as a decree *in rem* when drawn in question in the Federal court.

FIFTH. The court erred in holding that an action under the statutes of Nebraska to quiet the title to real estate in that state is to be regarded as an action *in personam* and not as an action *in rem*, when drawn in question in the Federal court.

SIXTH. The court erred in overruling the plea in abatement and holding that citizenship was not necessary to the maintainance of this action.

SEVENTH. The court erred in holding that defendant in error, who is a citizen of Nebraska and who took a conveyance of the demanded premises on Nov. 16th, 1886, could question the validity of a decree rendered June 16th, 1882, on the ground that such decree deprived a non-resident of his property without due process of law.

ARGUMENT.

It is conceded that the proceedings of the district court of Lancaster county, in the case of Charles L. Flint vs Michael Hurley et al. are regular and in all respects conform to the statutes of Nebraska providing for constructive service by publication. It is contended, however, that these statutes, so far as they authorize a judgment or decree quieting the title to lands within said state against non-resident defendants served by publication only, are obnoxious to the XIV. Amendment to the Federal constitution and are therefore null and void. It is contended that a decree quieting title upon such service is not "due process of law" within the meaning of the constitution.

Defendant in error, by his petition, sought to make a case which would fall within Hart vs. Sansom et al., 110 U. S. 151. The facts in that case being somewhat similar to the case at bar makes it necessary to inquire

with some degree of care whether a similar decree rendered by the state courts of Nebraska, on constructive service as against a non-resident making no personal appearance is in any wise effected by the statutes of the state.

By reference to the certificate of division it will be seen that the decree of the district court of Lancaster county, Nebraska, was not rendered by virtue of its general equity jurisdiction, but it was "a decree quieting the title to real estate in Nebraska in an action prosecuted under the statutes of Nebraska." It was therefore a purely statutory action and not an action in chancery properly so-called.

It will be noticed that the opinion in Hart vs. Sansom, turns upon the fact that by the old chancery practice, an action to quiet title is an action *in personam* and not an action *in rem*, and that a judgment *in personam* as against one residing beyond the jurisdiction of the court where the decree is entered and where no appearance is made is absolutely void and subject to collateral attack.

We concede that a judgment or decree of the state court *in personam* on constructive service without personal appearance has no validity beyond the jurisdiction of the courts of the state, according to the reported decisions of this court, but we contend that an action *quia timet* under the statutes of Nebraska, is not action *in personam* but is an action in the nature of an action *in rem*.

It should be noticed that the court in Hart vs Sansom, concedes it to be within the power of the state legislature to change the nature of the action *quia timet* from an action *in personam* to an action in the nature

of an action *in rem*, as the following quotation will show: "It would doubtless be within the power of the "state in which the land lies to provide by statute that "if the defendant is not found within the jurisdiction, "or refuses to make or cancel a deed, this should be "done in his behalf by the trustee appointed by the "court for that purpose. (Citing authorities). But in "such a case as in the ordinary exercise of its jurisdic- "tion a court of equity acts *in personam*, by compelling "a deed to be executed or canceled by or in behalf of "the party. It has no inherent power, by the mere "force of its decree to annul a deed to establish a title. "In the judgment in question, no trustee to act in be- "half of the defendant was appointed by the court, "nor have we been referred to any statute authorizing "such an appointment to be made." The case came from Texas and as the court says no Texas statute is cited to modify the old equity practice.

In support of the legislative power to modify the old equity practice and to change the nature of its decrees we cite Holland vs Challen, 110 U. S. 15, where the court had under consideration the Nebraska statute providing for quieting title and it was there held that none of the old equity prerequisites to an action to quiet title were necessary under the Nebraska statutes, such as possession, disturbed possession and establishment of title at law before the action would lie.

By the statutes of Nebraska the power of a court of equity in reference to the status of titles to real estate situated within its jurisdiction, have been greatly enlarged and entirely new equities created. Secs. 57 and 58, Chap. 73, Com. Stat. 1885, p. 483, read as follows: Sec. 57. "That an action may be brought and prose

"cuted to final decree, judgment or order, by any per-
"son or persons, whether in actual possession or not,
"claiming title to real estate, against any person or
"persons, who claim an adverse estate or interest there-
"in, *for the purpose of determining such estate or interest,*
"and quieting the title to said real estate."

"Sec. 58. All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle and determine the *question of title between the parties* to said real estate, and to *decree the title to the same, or any part thereof, to the party entitled thereto;* and the court may issue the appropriate order to carry such decree, judgment, or order into effect."

These sections authorize the court to deal with the title to real estate brought in question under its provisions "*and to decree the title to the same or any part thereof to the party entitled thereto.*" The court deals with the title and not with the claimants. No deeds are necessary to be ordered, no acquittance to be executed. The decree may be likened to alienation by matter of record as known to the common law, II Blackstone, 349.

The supreme court of the state of Nebraska, had the construction and effect of this statute under consideration in Watson vs Ulbrich, 18 Neb. 186, where Watson brought an action of ejectment against Ulbrich to recover possession of certain premises. Ulbrich held under one Gray, who had procured a decree quieting his title, a tax title, under this statute as against Watson's grantor, a non-resident, on constructive service. Ulbrich set this title up as a bar to Watson's suit and in declaring the effect of the decree the court used the following language:

"The principal question to be determined is whether "or not the decree in favor of Gray, rendered upon "constructive service, is valid until set aside. No ob- "jection is made to the service, or any proceedings "connected with it. The real estate in controversy "was within the jurisdiction of the district court, and "that court had authority, in a proper case, to render "the decree confirming the title of Gray. In Castrique "vs Imrie, L. R., 4 H. of L., 414-429, Mr. Justice Black- "burn says, 'we think the inquiry is, whether the sub- "'ject matter was so situated as to be within the law- "'ful control of the state under the authority of which "'the court sits; and secondly, whether the sovereign "'authority of the state has conferred on the court "'jurisdiction to decide as to the disposition of the "'thing, and the court has acted within its jurisdic- "'tion. If these considerations are fulfilled the adju "'dication is conclusive against all the world.' The "court, therefore, in this case having authority to ren- "der the decree, and jurisdiction of the subject matter, "its decree is conclusive upon the property until va- "cated under the statutes, or set aside."

Now this being the construction placed upon the statutes of Nebraska by the supreme court of that state and the effect of decrees rendered in pursuance thereof, and it being in accord with the construction placed upon these statutes by the bar of that state as well as in harmony with their practice, it should receive a like construction by the Federal courts under that comity which must necessarily exist between courts under governments like ours. When the effect of state statutes touching the title to real property has been interpreted by the court of last resort in such state it becomes a rule of property in the state which will be recognized and enforced by this court.

Justice Thompson, speaking for the court, in Jackson vs. Chew, 12 Wheaton, 153, says upon this point: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that when any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of." Bugess vs. Seligman, 107, U. S. 20, is to the same effect. The language is as follows: "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal Court, no less than by the State Courts themselves, as authorative declarations of what the law is."

This construction given by the state court is corroborated by Sec. 23, Chap. 73, Com. Stat. 1885, p. 478, providing for the record of such decrees the same as deeds which reads as follows:

"Sec. 23. Any exemplification of any decree, or judgment in partition *or final decree in chancery affecting real estate*, may in like manner be recorded in the office of the register of deeds in any county in which any real estate described therein may be situated; such record or exemplification thereof shall be received in evidence,

and shall be as effective in all cases as the original exemplification would be if produced, and shall be open to the same objection."

The construction contended for is further corroborated by the provision of the code for substituted service on non-resident defendants. Section 77 of the code of civil procedure of Nebraska Stat. 1885, p. 637, reads as follows: "Sec. 77. Service may be made by publication in either of the following cases: *Fourth.* In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially *in excluding him from any interest therein*, and such defendant is a non-resident of the state or a foreign corporation."

By Sec. 82 of the Code of Nebraska, it is provided that "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; * * * * * but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment."

This statute, therefore, preserves for five years after the entry of judgment or decree the rights of the parties to the suit as between themselves, but those who have purchased property while such judgment or decree is in force and in reliance upon it are protected.

Scudder vs. Sargent, 15 Neb. 102.

Keene vs. Sallenbach, 15 Neb. 200.

Watson vs. Ulbrich, 18 Neb. 186.

Section 78 provides: "Before service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this state, on the defendant or defendants to be served by publication and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

The provisions here quoted clearly show that the court is to deal with the title or *res* only.

Our contention is further corroborated by Sec. 429, b. of the Code, Stat. 1885, p. 683, which directly provides what shall be the effect of a decree in actions *quia timet* and which reads as follows: Sec. 429 b. "When any judgment or decree shall be rendered for a conveyance, release or acquittance, in any court of this state, and the party or parties against whom the judgment or decree shall be rendered, do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree." This section came under the consideration of this court, in Langdon vs. Sherwood, 124, U. S., 74, in which case the court uses the following language: "We are of the opinion that if this section of the code be valid, it was the intention of the makers of it that a judgment and decree, such as the one before us, should have the same effect, where the parties directed to make the conveyance fail to comply with the order, as it would have had if they

had complied, in regard to the transfer of title from them to the party to whom they were bound to convey by the decree. The language of this section of the code hardly admits of any other construction. When the party decreed to make the conveyance does not comply therewith within the time mentioned in the judgment or decree, such judgment or decree shall have the same effect and operation and be as available as if the conveyance had been executed. The operation or effect here meant was the transfer of title, and it could not have been made any clearer if it said it should have the effect of transferring the title from the party who fails to convey to the one to whom it ought to be conveyed. This must have been the meaning in the minds of the legislators.

It was undoubtedly the ancient and usual course in such a proceeding to compel the party who should convey to perform the decree of the court by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court so that he could be attached, it has long been the practice of many of the states, under statutes enacted for that purpose, to attain this object, either by an appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration by which the judgment or decree of the court was made to stand as such conveyance on the failure of the party ordered to convey.

The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the states of the Union. There can be no

doubt of their efficacy in transferring the title, in the courts of the states which have enacted them, nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.

The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the state."

Mr. Pomeroy in his excellent work on Equity Jurisprudence uses the following language touching statutes of the character quoted. Vol. 3, Sec. 1517:

"The fundamental doctrine of equity as originally administered has already been explained, that its remedies and decrees operated *in personam* upon defendants, and not *in rem* upon the subject matter; that a decree was not of itself a legal title nor did it transfer title to the plaintiff. This original doctrine has been abrogated, for all classes of remedies to which it could apply by statutory legislation in a large number of states. (A foot note gives the states and includes Nebraska among them.) This legislation may be reduced to two general types; (1) That by which the decree itself without any act of the defendant or of an officer on his behalf becomes a title, and vests a legal estate in the subject matter in the plaintiff; (2) That by which a commissioner, master, or other officer of the court executes the decree, and through his conveyance or other official act transfers the legal estate from the defendant to the plaintiff, or otherwise vests the plaintiff with title. Both these types are often found in the statutes of the same state, (and they are subject to minor modifications,

as shown by the foot note which contains a list of the states and statutes.") Nebraska legislation covers both types as we have seen.

In Boswells Lessee vs. Otis, 9 How. 336, where an Ohio statute authorizing constructive service in actions to enforce specific performance of a contract for the sale of real estate the court uses the following language: "Where the record of a judgment is brought before the court, collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; *but where such a proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character.* * * * It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases, every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties must be regarded."

It will be observed that this language is directly applicable to the case at bar. In Parks vs. Overman, 18 How. 137, where an Arkansas statute providing for

quieting title to property sold for taxes on substituted service was under consideration the court uses the following language: "It is a very great evil in any community, to have titles to land insecure and uncertain; and especially in new states, where its result is to retard settlement and improvement of their vacant lands. Where such lands have been sold for taxes, there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a law suit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property, and, like a proceeding *in rem* it becomes conclusive against the absent claimant, as well as the present contestant." As was said by the court in Clark vs. Smith, 13 Pet. 203, with regard to a similar law of Kentucky: "Kentucky has an undoubted power to regulate and protect individual rights to her soil and declare what shall form a cloud over titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The state legislature have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the state court."

"In the case before us, the proceeding, though special

in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another state."

Now we submit that these authorities fully substantiate the position for which we contend, namely: That under the Statutes of Nebraska, an action to quiet title is an action in the nature of an action *in rem* and is not an action *in personam* and while the case of Hart vs. Sansom, 110 U. S., bears some similarity in facts to the case at bar, the decree there in question did not seem to be supported by any of the statutory provisions which exist in Nebraska and cannot possibly form any precedent for the determination of the case at bar.

This court has held that the power to prescribe the requisites as well as the manner and form necessary to the transfer of title to realty belongs exclusively to the state legislature. Hence, the transfer may be by the decree of a court as well as by formal deed. The only question is, has it so provided? We think it has. The statute so provides and the authorities quoted from, so hold. If the court had power by its decree either to pass the title or to exclude the claim of the defendant without compelling him to convey or acquit, then the action is in the nature of an action *in rem*, and the jurisdiction may be obtained to enter such decree by constructive service against a non-resident even though he does not appear, and it will be good against a collateral attack.

In the case of Huling vs. The Kaw Valley Railway, 130 U. S. 559, this court had under consideration the validity of proceedings under the statute of Kansas for the appropriation of lands for the use of railway and

other corporations, where such proceedings were based wholly upon the service by publication, and where the owner of the fee was a non-resident of the state, and had no notice or knowledge of the pendency of the proceedings. And it was there held that such proceedings were valid, and vested the railroad company with all the rights that it would have acquired against the resident land owner who had been personally served. In holding such proceedings a bar to an action on the part of such non-resident in the nature of trespass against the railway company, Justice Miller, speaking for the court, says:

"In the case now before us, the proceeding was had under the latter provision of the statute. The transcript on its face seems to be regular in every particular, showing a full compliance with all the requirements of the statute on the subject. There was the proper publication made in the newspaper, and, indeed, so far as the face of the record is concerned, no objection seems to be made to it, except that it is very urgently argued that the notice published was not sufficient because it did not apprise the party of what land was to be taken; and, if in that respect it was a sufficient compliance with the statute, it is then insisted that the statute itself was void as authorizing the taking of private property without due process of law."

"Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form

of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters.

The owner of real estate, who is a non-resident of the state within which the property lies, cannot evade the duties and obligations, which the law imposes upon him in regard to such property, by his absence from the state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the state has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every state of the Union.

It is, therefore, the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is 'due process of law,' as applied to this class of cases."

In the case of Mellen vs. The Moline Iron Works, 131

U. S. 352, this court had under consideration the validity of a decree rendered in the Circuit Court of the United States for she Northern District of Illinois, brought against a citizen of Ohio to remove a cloud from and quiet and establish the title to certain real estate lying in said Northern District of Illinois. That suit was brought under the provisions of the Congressional act of 1875, authorizing personal service beyond the District wherein such suit is pending, or constructive service by publication. After such decree was rendered the non-resident defendant Hill conveyed his interest to one Mellen, who afterwards brought suit in the Circuit Court of the United States for the Northern District of Illinois, to assert his title to and rights in the property involved in the former decree. This court held that the Circuit Court of the United States for the Northern District of Illinois in the suit to quiet title and to remove incumbrances and clouds therefrom obtained jurisdiction over the property lying within the jurisdictional limits of said court, and that whatever right or title the non-resident defendant Hill may have had in such property were cut off and barred by the decree in that case, and held that a decree in equity under the statute of 1875 upon service as provided in said statute was a bar to the suit afterwards brought by the grantee of Hill.

Justice Harlan, speaking for the court, said:

"Was the decree in the suit instituted by the National Furnace Company (to be hereafter called the Furnace Company) against the Moline Malleable Iron Works (to be hereafter called the Iron Works) and others, declaring that Hill was not entitled to a lien or security by reason of the trust deed and chattel mort-

gage of June 23, 1883, void for want of jurisdiction in the court that rendered it? This is the principal question in the present case. Its solution depends upon the construction of the eighth section of the act of March 3, 1875, determining the jurisdiction of the Circuit Court of the United States. 18 Stat. 472, c. 137-8.

That section authorizes an order to be made directing an absent defendant in any suit brought in a Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title to real or personal property within the District where suit is brought—such defendant not being an inhabitant of or found therein, and not voluntary appearing in the suit—to appear, plead, answer or demur, by a designated day. The order must be served upon the absent defendant, if practicable, wherever found, and upon the person, if any, in charge or possession of the property. If such personal service be not practicable, the order must be published in such manner as the court may direct, not less than once a week for six consecutive weeks. If the defendant does appear, plead, answer or demur, within the time limited, or within such further time as may be allowed, the court—proof being made of service or publication of the order, and of the performance of the directions therein contained—may "entertain jurisdiction and proceed to the hearing and adjudication of such suit in same manner as if such absent defendant had been served with process within the said district." But, the act declares, "said adjudication shall, as regards said absent defendant or defendants without appearance, *affect only the property which shall have been the subject of the suit and under the jurisdiction of the*

court therein, within such district." A defendant, not personally notified as provided in the act, may within one year after final judgment enter his appearance in the suit; whereupon the court must make an order setting aside the judgment and permitting him to plead, on payment of such costs, as shall be deemed just: the suit then to proceed to final judgment, according to law." The previous statute gave the above remedy only in suits "to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," while the act of 1875 gives it also in suits brought "to remove any incumbrance or lien or cloud upon the title to" such property. Rev. Stat. 738; 18 Stat. 472, c. 137-8.

* * * * * * *

"This brings us to the question whether the steps taken in the suit brought by the National Furnace Company were such as authorized a decree that would affect Hill's interest in the property covered by the trust deed and chattle mortgage. We lay out of view the fact that Hill was a citizen of Ohio, and neither appeared nor was served with process within the district in which the suit was brough. He was personaily served with copies of the order requiring him to plead, answer or demur, and the decree only affects his interest in property within the territorial limits of that district."

In the case of Mellen vs. Iron Works, *super*, the service upon Hill was made upon him personally in the State of Ohio while the suit was pending in the Circuit Court of the United States for the district of Illinois. Such personal service, however, beyond the jurisdiction of the Circuit Court was equivalent only to con-

structive service by publication, and could have no more binding effect upon Hill, than would a service by publication under the same statute.

Huling vs. Kaw Valley Railway, 130 U. S. 563.

Salisbury vs. Sands, 2 Dillon, 270.

Blair vs. West Point Mfg. Co., 7 Neb. 152.

Such personal service beyond the jurisdiction of the court would not support the personal judgment rendered thereon, any more than would constructive service by publication.

Penn vs. Hayward, 14 Ohio S. 304.

Williams vs. Welton, 28 Ohio S. 468.

Fisher vs. Fredericks, 33 Mo. 612.

Weil vs. Lowenthal, 10 Iowa 575.

Brooklyn Trust Co. vs. Bulmer, 49 N. Y. 84.

The Federal law of 1875 is essentially the same as the Statutes of Nebraska on that subject. If a Federal law giving the Circuit Court the power to determine the title to property within its jurisdiction, and cut off and bar the title of a non-resident upon service by publication, or, what is no better, personal service beyond the jurisdiction of the court, then there can be no valid objection to a state law conferring a like power upon the courts of Nebraska. Neither provides for any judgment or decree that shall have any extra territorial force or go beyond fixing the status and determining the title to property situated within the jurisdiction of the court.

In the case of Dillon vs. Heller, 18 ~~N. W.~~ Pac. Rep. 693, the Supreme Court of Kansas had under consideration the statutes of that state authorizing suits to quiet title

upon constructive service by publication against non-residents, the opinion by Justice Valentine considers the matter in all its bearings and reviews all the cases decided before that time, and held such decrees valid. Among other things, he says:

"While the plaintiff in error does not in terms claim that a court cannot, in any case where the defendant is a non-resident and out of the state, obtain jurisdiction to hear and determine the case by virtue of a service of summons only by publication, yet, such is the result of his argument; and, in support of such argument, he cites a number of authorities, the principal of which is the case of Hart vs. Sansom, 110 U. S. 151, 3 Sup. Ct. Rep. 586. We do not think, however, that the authorities cited go to the extent claimed for them. Of course, a court cannot obtain jurisdiction of the person of a non-resident defendant by means only of a service of summons by publication; nor can a court obtain jurisdiction of the person of any person who is a non-resident, and out of the state, by any kind of service, or by any kind of process or notice, for the jurisdiction of the courts of any sovereignty can never extend beyond the domain of the sovereignty which creates them. Amsbaugh vs. Eank, 33 Kan. 100, 105, 5 Pac. Rep. 384. No court in Kansas can compel a non-resident defendant out of the state to come within the territorial boundaries, or to submit himself to its jurisdiction, or to do or perform any other act or thing; but this lack of power on the part of the court does not depend upon the character of the service of process made upon the defendant, but it arises from the well established doctrine that the jurisdiction of one sovereignty (through its courts or otherwise) cannot extend into territorial boundaries of another sovereignty. Therefore, for the purpose of this

case, it will be admitted that the court below did not have jurisdiction of the person of the defendant below (plaintiff in error.) But that does not settle this controversy. The court below had jurisdiction of something. It had jurisdiction of the plaintiff below, and it had jurisdiction of the subject matter of the action. The latter position, however, is questioned. Jurisdiction is of two kinds; jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction *in personam* and jurisdiction *in rem*. And jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. Now, it may be admitted, for the purposes of this case, and is admitted, that the old equitable action to quiet title to real estate was purely an action *in personam;* and, indeed, it will be admitted that originally every action in equity was purely an action *in personam*. But such is not the case under the statutes of this state, and such is not the case with respect to the present action. The present action is purely a statutory action, brought by the plaintiff under Section 594 of the Civil Code, and is one of a kind of actions which can be maintained only by a person who is in the actual possession of the property in controversy, either by himself or tenant. Where personal service of summons can be obtained in such action, the action is one *in personam* as well as *in rem;* but, where service of summons can be had only by publication, then the action is one only *in rem*. The present action is one only *in rem;* and the court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the

only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the state any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the state belonging to non-resident owners out of the state, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the state, or to the courts of the state, and where the most urgent public policy and justice require that the state and its courts should assume jurisdiction over such property? Power of this kind has always been exercised, not only in Kansas, but in all the other states. Lands of non-resident owners, as well as of resident owners, are taxed and sold for the taxes; and the owners thereby may totally be deprived of such lands, although no notice is ever given to such owners except a notice by publication, or some other notice of no greater value, force or efficacy. Beebe vs. Doster, 36 Kan. 666, 675-677, 14 Pac. Rep. 150. Mortgage liens, mechanic's liens, material men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property which they may have in Kansas; and the jurisdiction to hear and determine, in this kind of cases, may be obtained wholly and entirely by publication. Gillespie vs. Thomas, 23 Kan. 138; Walkenhorst vs. Lewis, 24 Kan. 420; Rowe vs. Palmer, 29 Kan. 337; Venable vs. Dutch, 37 Kan. 515, 519, 15 Pac. Rep. 520. All the states by proper statutes, authorize actions against non residents, and service of summons therein

by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done, where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its power and authority are limited by the constitution and laws of the United States; and, within the constitution and laws of the United States, the courts of Kansas may have all the jurisdiction over all persons and things within the state which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of everything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

This case is also found in 39 Kan. 599.

The case of Entreken vs. Howard, 16 Kan. 551, and Howard vs. Entreken, 24 Kan. 428, is in all respects like the case at bar, and in that case the present Circuit Judge of the Eighth Circuit, sitting then as one of the judges of the Supreme Court of Kansas, held that this was a purely statutory action and operated to transfer the title from defendant to plaintiff in the action.

This question is being raised in other states and we have been unable to find a single decision of a state court supporting the contention of defendant in error.

In Essig vs. Lower, 21 Northeastern Reporter, 1090.

Justice Coffey, speaking for the Supreme Court of Indiana, says: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, Rev. St. 1881, expressly authorizes the rendition of such a decree on publication."

In a case now pending in the U. S. Circuit Court for Nebraska, commenced by these plaintiffs in error in the District Court of Lancaster county to quiet the title to the premises in controversy against the defendant in error, and by the latter removed to the Federal Court, Justice Miller, of this court, in overruling a motion to remand, said:

OPINION OF JUSTICE MILLER, CASE OF ARNDT V. GRIGGS.

"This case was argued on motion to remand, and presents some difficulties that I do not think properly ought to be decided on that motion. The question that is raised, if there is anything in it, is a Federal one. The question is one whether a man can be deprived of his property without due process of law when in an action to quiet title he is a non-resident and the only service is by publication. That is a question undoubtedly of Federal law, because if that kind of a proceed-

by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done, where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its power and authority are limited by the constitution and laws of the United States; and, within the constitution and laws of the United States, the courts of Kansas may have all the jurisdiction over all persons and things within the state which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of everything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

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ing in which he is held to have his title barred is a violation of the constitutional provision concerning due process of law, then he has a right to have that question settled in the Federal court, and has a right to bring his case here by removal from the state court, because it is dealing with his rights under the constitution. Without deciding absolutely whether such a proceeding does deprive a man of his property without due process of law, as stated in the case before us, I decline to remand the case. I should have had some little hesitation in ordering the case here, if an application had been made to me, but it is here and I do not wish to assume the responsibility of remanding it when there is a question so clear, but I do not feel at liberty to let the case go without stating that I do not concur in the views taken by counsel yesterday on that subject, that that kind of a proceeding properly conducted does deprive a man of his property without due process of law. I took part in the case of Pennoyer vs. Neff, 95 U. S., 714, which is the original foundation of that idea and before I agreed to the opinion in that case I had inserted in it, at my request, to the effect that a proceeding directly intended to affect the title of real estate, which was within the power and jurisdiction of the court was not included in that decision. That is the meaning of the interlocutory words. I had them inserted and know what they mean.

The case of Hart vs. Sansom, in 110 U. S. Supreme Court Reports, is a little stronger in some of its expressions in an opposite view of the case to what I have stated, but even in that there is nothing in the case to show that it probably was intended to decide all that Mr. ——— claimed for it, and that it was a cause in

which the decision of the state court did not intend to deprive Mr. Hart of his right in the property.

In short the principal idea which I suggested yesterday after looking at these authorities comes back to me with great force, that these proceedings by which a man in possession of real estate asks to have his right to that property established by a judgment at law or decree in chancery proceeds under the statute and not under the general chancery proceedings. The proceedings to quiet title are in the nature of proceedings *in rem*. Why is it not? The sheriff can put his hand on real estate and levy his attachment, the petitioner in that case brings his property into court, describes it, says it is this property in regard to which I am in possession and I bring it here to have the title to it established. If that is not as much a proceeding *in rem*, as any thing short of the old fashioned action proceeding *in rem*, I do not understand it. It is in regard to that property that the party is asking a decree and the court rendered a decree turning the party out and giving the possession to him. I take it that is a proceeding *in rem*, as much as is the foreclosure of a mortgage. That would be one of the cases where you proceed both *in personam* and *in rem*. I have to say about this case of Leitzlock vs. May in which it was stated that I had decided the other way. May was in possession of the land and brought suit to have his title established under the statute, under the same statute now under consideration, and service by publication was had and May got his decree, establishing his title and declaring the title of Leitzlock to be void and null, but Leitzlock came in and made his motion to set that order aside and had it set aside and had a decree established that the original title was

a good title * * * how can that be construed that I had decided that such a proceeding is void I fail to see."

The real, and in truth the only, question involved in this case is the legislative power of a state over the title to real estate lying within its territory. The states have claimed, and without question, exercised such power from the foundation of the Federal government. While the guaranty of "due process of law" was not in terms made a part of the Federal constitution until the adoption of the XIV. Amendment—yet it was before that time a well understood principle of American constitutional law, having formed a part of many state constitutions. It has never been supposed that the statutes of the various states providing for the quieting of title to real estate within their boundaries upon constructive service were obnoxious to such a provision when found in the constitutions of such states. Congress, following the example of the states, by the act of March 3d, 1875, gave the same remedy upon the same kind of service and titles acquired under such decrees have been upheld by this court. Mellen vs. Iron Works *super*. It has therefore become a rule of property in both the State and National Courts. Purchases have been made, money paid and improvements erected on the faith of these decisions, State and Federal. To hold otherwise now would unsettle titles in nearly every state of the Union, and instead of the termination of litigation, which is always favored, the opportunity would be offered to the litigious to speculate in doubtful titles. It is a somewhat remarkable circumstance that in Mellen vs. Iron Works, Watson vs. Ulbrich, as well as in the case at bar, the party invoking

the protection to this constitutional provision is not the non-resident whose property it is claimed was taken "without due process of law," but one who took the supposed title with full knowledge of the proceedings by which that title was divested. In the case at bar we have the ludicrous spectacle of a citizen of Nebraska taking a conveyance, in 1886, of Nebraska lands, from one whom the Nebraska courts had already held to have no title, bringing an action against innocent purchasers in possession, and then appealing to the Federal courts on the ground that in 1882 a non-resident had been "deprived of his property without due process of law."

This is but a fair specimen of what may be expected in nearly every state in the Union, should this court affirm the judgment of the court below.

The doctrine here contended for by plaintiffs in error has for many years been a rule of property in Nebraska, the courts, the bar, and the people have learned to look upon it as the well settled law of that state, and we cannot believe that this court will, at this late date, reverse the rule and thereby unsettle titles taken in reliance upon it.

Scudder vs. Sargent, 15 Neb. 102.

Keene vs. Sallenbach, 15 Neb. 200.

Watson vs. Ulbrich, 18 Neb. 189.

The court acquires jurisdiction to quiet title by constructive service against non-resident defendants in Illinois.

Cloyd vs. Trotter, 118 Ill. 391.

Substituted service gives jurisdiction against non-

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the protection to this constitutional provision is not the non-resident whose property it is claimed was taken "without due process of law," but one who took the supposed title with full knowledge of the proceedings by which that title was divested. In the case at bar we have the ludicrous spectacle of a citizen of Nebraska taking a conveyance, in 1886, of Nebraska lands, from one whom the Nebraska courts had already held to have no title, bringing an action against innocent purchasers in possession, and then appealing to the Federal courts on the ground that in 1882 a non-resident had been "deprived of his property without due process of law."

This is but a fair specimen of what may be expected in nearly every state in the Union, should this court affirm the judgment of the court below.

The doctrine here contended for by plaintiffs in error has for many years been a rule of property in Nebraska, the courts, the bar, and the people have learned to look upon it as the well settled law of that state, and we cannot believe that this court will, at this late date, reverse the rule and thereby unsettle titles taken in reliance upon it.

Scudder vs. Sargent, 15 Neb. 102.

Keene vs. Sallenbach, 15 Neb. 200.

Watson vs. Ulbrich, 18 Neb. 189.

The court acquires jurisdiction to quiet title by constructive service against non-resident defendants in Illinois.

Cloyd vs. Trotter, 118 Ill. 391.

Substituted service gives jurisdiction against non-

resident defendant to set aside a conveyance as fraudulent as to creditors.

Adams vs. Cowles, 95 Mo. 501.

Partition is an action in the nature of a proceeding *in rem*, and substituted service gives jurisdiction against a non-resident defendant.

Wuntzel vs. Lundry, 39 La. 312.

In doubtful cases this court will not adopt a construction which will oust one in actual possession, especially is this the case where, as in the case at bar, such possession is under a title held good by the state tribunals.

Preston's Heirs vs. Bowmar, 6 Wheaton, 580.

"The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, *or any other mode*, is exclusively subject to the government within whose jurisdiction the property is situated."

United States vs. Fox, 94 U. S. 320.

McCormick vs. Sullivant, 10 Wheat. 202.

Where the highest judicial tribunal of a state has laid down principles of law affecting the title to real estate within such state and such principles of law have become rules of property in such state this court will adopt them and follow the decision of such state

tribunal when called upon to adjudge titles to lands lying in such state.

Beauregard vs. New Orleans, 18 How. 497.

Suydam vs. Williamson, 24 How. 434.

The judgment should be reversed and the case dismissed.

Respectfully submitted.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON.
Attorneys for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
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CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1889.

No. 1150.

AUGUST F. ARNDT, SR., *et al.*,
Plaintiffs in Error.

vs.

NATHAN K. GRIGGS,
Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
Attorneys for Plaintiffs in error.

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REPLY BRIEF.

Counsel for defendant in error in opposing brief at page 6 contended that this court should not pass upon the questions raised by the certificate of division, because they are the only questions involved in the case, and would in effect be ruling on

the demurrer itself. If their position be correct, then a case involving but a single proposition of law would not be reviewable, notwithstanding a certificate of division, because this would involve passing on the whole case. A simple statement of the proposition is its best refutation.

THE LAW CONSTITUTIONAL.

Counsel for the defendant in error *concede that the decree in Flint vs Hurley is regular in form and that the proceedings conform to the Statutes of Nebraska governing such actions*, but rest their case on the broad ground of the want of "power of legislatures to enact such laws and to authorize such proceedings," (pg 7. While all concede that a law authorizing a *personal money judgment* against a non-resident would be void, we confidently assert that this court has never intimated that a state might not authorize its courts to adjudicate and determine the title to real property situated within its borders even as against non-residents.

In Hart vs Sansom, 110 U. S., 151, the only case in this court relied upon by the defendant in error, the constitutionality of such laws is expressly recognized by this court.

The language of the court is: "It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction or refuses to make or cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."

All that was ever decided in the case of Hart vs Sansom is that there was no law in Texas (or what is the same thing none was called to the attention of this court) providing for the proceeding in the nature and form then under review by this court. Instead of questioning the constitutionality of such legislation this court expressly conceded it. How then can this be cited as a case in point, or as controlling the case at bar?

It will be seen that all the circuit court decisions quoted by counsel for defendant in error are based upon a mistaken view of what this court decided in Hart vs Sansom. These cases have all gone upon the theory that this court in that case had passed upon the *constitutionality* of such legislation, instead of the existence of such legislation in Texas and the conformity of the proceedings thereto.

In the case of Leitzbach vs May relied upon by defendant in error, the decree quieting the title against the non-resident had, on motion as provided by the statute, been set aside and a decree actually rendered confirming the title in the defendant in that same case. Hence when the ejectment case was heard there was no decree to claim under but one for the adverse party. This case can have no application to the case at bar where the decree still stands in full force and effect.

The circuit judges have merely followed, with much reluctance, what they erroneously supposed to be the decision of this court, and hence these cases can add nothing to the authority of Hart vs Sansom upon an erroneous view of which they are based.

POSSESSION.

It is contended that the decree is void because Flint was not in possession at the time he brought action to quiet title in the state court and could not therefore take the property under his arm and bring it into court and thus give the court dominion over it. It will be seen (record 4) that Flint *alleges* that he was *in possession* and that the court (record 8) when the cause was heard upon the pleadings *and proofs adduced*, found that Flint was *in possession*. We submit that this allegation in Flint's petition gave the court *jurisdiction* to try that fact, and having tried it *upon the proof adduced* that finding is conclusive until set aside. The argument of counsel seems to be that the jurisdiction of the court depended not on the allegations in the pleadings but upon facts not alleged. Let us see where this would lead us. Had Hurley appeared to the action and the court should have found

that Flint was neither in possession nor yet had the legal title the counsel would say the court had no jurisdiction. If it had none over the *subject matter* when Hurley was a non-resident it could have none when he was in court. If it had no jurisdiction of the subject matter then the adjudication would bind nobody and neither plaintiff nor defendant would be concluded by the decree. The subject matter was clearly within the jurisdiction of the state court and its decree is conclusive until set aside.

Watson vs Ulbrich, 18 Neb., 186.

It was not, however, necessary, under the Statutes of Nebraska, to allege possession in the plaintiff, if the defendant was not in possession that was sufficient.

Holland vs Challen, 110 U. S., 15.

It will be observed that the decree in Flint vs Hurley was rendered June 16, 1882, (record 2), and that the conveyance from Hurley to defendant in error bears date of Nov. 16, 1886, record 1), and therefore under the Statutes of Nebraska (plaintiff's pricipal brief 10) there still remained at the time of this conveyance just seven months of the five years allowed to open that decree and be let in to defend. And if any property had passed beyond his reach in consequence of the decree Hurley's right of action for its value would have been preserved against this "tax-title speculator."

Watson vs Ulbrich, 18 Neb., 186.

This decree remaining in full force and effect and the property by mesne conveyances having passed to innocent purchasers they will be protected.

The judgment should be reversed and cause remanded with a direction to dismiss.

WALTER J. LAMB.
ARNOTT C. RICKETTS.
HENRY H. WILSON,
Attorneys for Plaintiffs in error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1150.

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vs.

NATHAN K. GRIGGS, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

NATHAN K. GRIGGS,
SAMUEL RINAKER,
JULIUS A. SMITH,
Attorneys for Defendants in Error.

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JULIUS A. SMITH,
Attorneys for Defendants in Error.

STATEMENT OF CASE.

This is an action in ejectment to recover possession of a quarter section of land in Lancaster county, Nebraska, of the value of $4,000.00, and is brought to this Court on error, from the Circuit Court of the United States for the District in which said land is situated, upon a division of opinion of the Judges of said Court.

As appears by the printed record herein—p. 1—the defendant in error commenced this action by the filing of a petition containing the usual averments of title in him, and in addition, set out the claim of the defendants below to the premises in question. To this his petition plaintiff in error filed a general demurrer.

The record also shows that the right of defendant to the land in question, was based alone upon the following facts:

1. December 6, 1860, the land was patented to one Michael Hurley;

2. November 16, 1886, said patentee conveyed said premises to defendant in error.

3. February 2, 1878, a tax deed for said premises, was made to one Charles L. Flint, but which, as is shown by the certificate of division herein—Rec. 13—was void upon its face, and conveyed no title whatever;

4. January 14, 1881, another pretended tax-deed for said premises was made to one Upham, but said deed was also void upon its face, and conveyed no title whatever, as is shown by the record;

5. May 3, 1881, the said Upham quit-claimed his interest in said premises to the above-named Flint;

6. March 27, 1882, the said land being then vacant and unoccupied—Rec. 13—said Flint commenced an action in the District Court of Lancaster county, Nebraska, against the above-named Hurley, to quiet his—said Flint's—title to said premises as provided by Sec. 57, Chap. 73, Stat. Neb., and in order to procure service upon the said defendant affidavit was made by H. H. Wilson—one of Flint's attorneys—that said Hurley was a non-resident of Nebraska; whereupon service was had upon said Hurley by publication, in the manner provided by the laws of Nebraska;

7. June 16, 1882, the District Court rendered a decree on default in the action last mentioned, quieting Flint's title to said premises as against said Hurley and all persons claiming under him—Rec. 13—the said Hurley not having appeared in the action, and not having any actual knowledge of its pendency;

8. July 1, 1885, Flint quit-claimed his interest in said land, to Ricketts & Wilson, the attorneys who had brought the action for him as against Hurley;

9. August 14, 1885, said Ricketts & Wilson made a deed of conveyance of said premises to August F. Arndt, one of the plaintiffs in error in this action, and the same day the said grantee conveyed his interest in said land to Rosa Reuther, another of the plaintiffs in error.

As appears from the pleadings in this action—Rec. 17—the only question in this case, was as to the validity of the decree mentioned above. We insisted below and still insist that, as said decree was *in personam*, it was void, being in contravention of that provision of the Federal Constitution which declares that no person shall be deprived of property

without due process of law. The Circuit Court, following the decisions of this Court, overruled the general demurrer filed to the petition of defendant in error, thus holding said decree invalid. The Judges, however, signed a certificate of division of opinion, as to the validity of said decree, and this is now the sole question before this Court. Said certificate is as follows:

"This cause came on for hearing before the Hon. David J. Brewer, circuit judge, and Elmer S. Dundy, district judge, on this 12th day of November, 1888, upon the demurrer of the defendants to the petition of the plaintiff filed herein, and said cause is argued by counsel and submitted to the Court; and thereupon, it appearing to the Court from the petition of plaintiff, and defendant's demurrer thereto that:

"December 6th, 1860, the premises in controversy, to-wit, 160 acres of land in Lancaster county, Nebraska, were conveyed to one Michael Hurley by the Government of the United States;

"November 16th, 1886, said premises were duly conveyed to plaintiff in this action by said Michael Hurley, and said plaintiff has not since conveyed said premises to any other person;

"February 3d, 1878, the treasurer of Lancaster county, Nebraska, made a pretended tax deed of said premises to Charles L. Flint, which said pretended conveyance was and is void and conveyed no title to said Flint;

"January 14th, 1881, the treasurer of said county made a pretended tax deed to one J. B. Upham for the said premises, which said pretended tax deed was and is void and conveyed no title to said Upham;

"May 3d, 1881, said Upham quit-claimed his interest in said premises to said Flint;

"March 27, 1882, the said premises being vacant and unoccupied lands, the said Charles L. Flint commenced an action against the above-named Michael Hurley to quiet his—said Flint's—title to said premises, as provided by Sec. 57 of Chapter 73, of the Compiled Statutes of Nebraska, and thereupon, in order to procure service upon said Hurley, made affidavit that said Hurley was a non-resident of the State; whereupon service on said Hurley was had by publication in the manner provided in sections 77 to 80, inclusive, of the Nebraska Code of Civil Procedure;

"June 16, 1882, the District Court of Lancaster county, Nebraska, ordered, adjudged and decreed that the title and possession of the said premises were in the said Charles L. Flint, and further decreed that the title to said premises should be quieted as against Hurley and all persons claiming through or under him, and forever enjoining the said Hurley and all persons claiming through or under him, from setting up any claim to said premises or any part thereof adverse to the title or possession of said Flint, or in any manner interfering with his use and enjoyment of the same;

"Said decree is still unreversed;

"Said Hurley has never been a citizen or resident of Nebraska, and no service of summons was ever made upon him in said action so brought against him by said Flint, and he had no actual notice of the pendency of the said action, the only service made upon him in said proceeding being a constructive one, by publication in a newspaper published in said Lancaster county, Nebraska, and the only jurisdiction acquired over him in said action being by the constructive service aforesaid;

"July 1st, 1885, said Flint conveyed whatever interest he had in said premises to said Ricketts & Wilson; August 14th, 1885, said Ricketts & Wilson conveyed whatever interest in, or title they had to said premises to defendant, August F. Arndt, Sr.; August 14th, 1885, said August F. Arndt, Sr., conveyed whatever interest in or title he had to said premises to defendant, August F. Arndt, Jr.; August 14th, 1885, said August F. Arndt, Jr., conveyed whatever interest in or title he had in said premises to defendant, Rosa Reuther;

"Plaintiff claims to be the owner of the premises under the deed from Michael Hurley, and the defendants claim to be the legal owners of the premises in controversy, and are in possession thereof under and through the said proceedings and decree aforesaid and conveyances subsequent thereto aforesaid, and refuse to surrender possession to said plaintiff.

"And thereupon the said judges divided in opinion upon following questions of law arising in said cause on the consideration of the said demurrer to the plaintiff's said petition, and the same, upon request of the attorneys of the respective parties in said cause are now certified to the Supreme Court of the United States for decision:

"First. Is the above decree rendered as aforesaid against said Michael Hurley and in favor of said Charles L. Flint valid as against the plaintiff in this action?

"Second. Is a decree in the State courts of Nebraska under the statutes of that State on service by publication alone, where there is no appearance of the defendant to the action, valid, when rendered in an action quieting the title to lands situated in said State, when such decree is drawn in question in the Federal courts of that State?

"Third. Is a decree rendered in the courts of the State of Nebraska in an action to quiet the title to real estate situate in said State on service by publication alone, where there is no appearance of defendant in said action or knowledge of the pendency of the said action on his (defendant's) part, and where the land in question at the commencement and during the pendency of said action is vacant and unoccupied, valid when drawn in question in the Federal courts of that State?

"Fourth. Is a decree quieting the title to real estate in Nebraska in an action prosecuted under the statutes of Nebraska above referred to, be treated and regarded as a decree *in rem* when drawn in question in the Federal court?

"Fifth. Is an action under the statutes of Nebraska to quiet the title to real estate in that State to be regarded as an action *in personam* or an action *in rem*, when drawn in question in the Federal court?

(Signed) "DAVID J. BREWER,
Circuit Judge.

(Signed) "ELMER S. DUNDY,
District Judge."

As will be seen from the above certificate, the vital point upon which the Court divided, was as to the effect of the identical decree in controversy. All other points are merely abstract ones, collateral to and involved in the main one. As before stated, the record shows—1-12—that the question as to the validity of this decree was the only one in the case. We submit, therefore, that under the decision of this Court of May 23, 1887, in *Bank* v. *St. Louis*, etc., 7 Sup. Ct. Rep., 1054, and the cases there cited, this Court will refuse to pass upon the question presented, as to do so would be equivalent

to deciding the demurrer in the case below, and in fact the whole controversy presented by the pleadings, and allowing an appeal to this Court, notwithstanding the amount in controversy is less than $5,000, the land in controversy being of the value of $4,000 only—Rec. 1.

The decree in question, so far as its form is concerned, is the ordinary decree in actions to quiet title—Rec 9. It decreed that the title and possession of said premises be quieted in said Flint as against said Hurley and all persons claiming under him, and forever enjoined said Hurley and all persons claiming under him from setting up any claim to said premises adverse to the title or possession of said Flint. At the commencement and during the pendency of the action in which the decree in question was rendered, the land in controversy was vacant and unoccupied; there was no levy upon, seizure or attachment of it, no decree for its sale or partition, or for any act or thing to be done in regard to the thing itself, which is required to make the action partake of the nature of a proceeding *in rem;* the plaintiff was at no time in possession of any portion of the land and had no title whatever, legal or equitable, thereto; the defendant was a non-resident, owned the land by patent from the Government, and had no actual notice of the pendency of the action against him; and the only service had or attempted to be had upon him, was by publication of a notice in a newspaper in accordance with the statutes of Nebraska. The Court, nevertheless proceeded to determine the personal rights of the defendant, and to enjoin him from ever asserting title to his land. We contend that to hold a defendant bound by such a judgment, is contrary to the first principles of justice, is to encourage fraud, jeopardize and ignore private rights, and violate the constitutional guaranty that no State shall deprive any citizen of his property without "due process of law." To render such a judgment valid, "due process" of law requires that the defendant be brought within the jurisdiction of the Court "by service of process within the State, or his voluntary appearance." The question raised is not whether State statutes authorize such a decree under such circumstances, nor as to what construction State courts may have put upon such statutes. The question goes to the power of Legislatures to

enact such laws and authorize such proceedings. No rights can become valid under unconstitutional statutes. Nor can rules of property become established under state decisions construing such statutes, so as to control the decisions of this court. It is not for legislatures to determine what proceedings constitute "due process of law" and what do not. If the enforcement of that constitutional guaranty is to be taken from the keeping of the Federal Courts and committed to the judgment of the legislative bodies of the country, then the guaranty will be of small value.

Statutes authorizing personal judgments upon constructive service as well as judgments rendered upon such service, have invariably been held void by this Court. The decree in question, is a fair illustration of what may be expected on all hands, if this Court should reverse the decision of the Court below. Here, a tax-title speculator, and a non-resident of Nebraska, went into a State court, and by constructive service alone, obtained a decree against another non-resident, then the real owner of a certain tract of land, which not only robbed the latter of his property, and enjoined him from ever even claiming it, but in addition declared the wrong-doer to be the owner of the premises to which he had no title whatever, and in actual possession thereof, notwithstanding the same were wholly unoccupied.

The question here presented is not, however, a new one, and its decision does not depend merely upon a consideration of those general principles which underlie and sustain our system of jurisprudence.

In the case of *Hart* v. *Sansom*, 110 U. S. 151, this court decided that a decree to remove a cloud from the title to real estate, is a proceeding *in personam*, and that jurisdiction of the person is necessary to the making of the decree. In that case the court say:

"This is a writ of error sued out by Edmond J. Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the Circuit Court of the United States for the northern district of Texas, in an action brought by him against Marian Sansom, and the heirs at law of Thomas M. League, citizens of Texas, to recover a tract of land in Johnson County, in that state, of which they had dispossessed him.

At the trial, Hart proved his title, under a patent from the Republic of Texas to League, and a deed, with general covenants of warranty from League, dated August 19, 1846, and both recorded on December 9, 1879; and it appears that defendant Sansom held possession of the land, under a lease from the other defendants, and as their tenant. The defendants offered in evidence the record of a judgment rendered by the District Court of Johnson County, on August 24, 1875, upon the petition filed June 11, 1873, by the heirs at law of League, who died intestate November 5, 1865, against Virgil Wilkerson, Orlando Dorsey and several other persons, and Hart; alleging that Wilkerson ejected the plaintiffs from this land, and unlawfully withheld possession thereof from them; that, on October 29, 1870, the defendant Dorsey, by deed, duly recorded, conveyed to some of the other defendants than Wilkerson and Hart, three-fourths of the land, reserving in that deed the remaining fourth to himself, and that other deed, particularly set forth, of parts of the land, were afterward made to the rest of such other defendants, and recorded; that the defendant, Hart, 'sets up some pretended claim and title to said land;' and 'that the defendant, Wilkerson, is a naked trespasser on the land of plaintiff; and that the several other defendants' several deeds, which appear upon the records of deeds of Johnson County, are fraudulent and void, and that the said pretended claims and deeds, and each and all of them, cast a cloud upon the title of plaintiffs;' and praying, 'That they have judgment, that the cloud upon the title of plaintiffs, created by the several deeds aforesaid, be removed, and that the said deeds and each and all of them be declared null and void, and be cancelled, and be discharged of record; and that the title of plaintiffs in and to said premises and every part thereof may be confirmed and established as against said defendants and each and every of them, and all persons claiming through or under them, and for a writ of possession, damages and costs.

"That record also showed the issue and due service of citations to all of the defendants except Dorsey and Hart; the issue of a citation, directing the Sheriff to serve Hart, being a citizen of Louisiana, by publication, and the Sheriff's return, showing the execution of the citation by such publica-

tion in a newspaper of the county four successive weeks before the return day; and a like service by publication upon Dorsey, a citizen of New York.

That record further showed a default of all the defendants;

* * * * * * *

That record finally showed a judgment that the plaintiffs recover of the defendants the premises described, and that the several deeds in the plaintiffs' petition mentioned, be and the same are hereby annulled and cancelled, and for naught held, and the cloud thereby removed, and for costs, and that execution issue for the costs.

The Circuit Court against the plaintiffs' objection, admitted the judgment in evidence, instructed the jury that it divested the plaintiff of his title to the land, and directed a verdict for the defendants.

The plaintiff, deriving his title under a deed with covenants of general warranty from League, is entitled to maintain this action against League's heirs, who are estopped by those covenants, unless the former judgment in the action brought by them in the State Court has adjudicated the title as between them and the present plaintiff. It is, therefore, necessary to consider the nature and effect of that judgment.

The petition combined, in accordance with the practice prevailing in that State an action in the nature of ejectment to recover possession of the land and a suit in equity to remove a cloud upon plaintiff's title; and service by publication was in the form authorized by the local statutes against non-residents. *1 Paschal, Dig. of the Laws of Texas*, 4th ed. Art. 25.

* * * * * * * *

The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and cancelled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession.

* * * * * * * *

But if there is any judgment, except for costs, against Hart, it is, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title and is no bar to the present action.

Generally, if not universally, equity jurisdiction is exercised *in personam* and not *in rem*, and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud from title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by the statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. *Langdell Eq. Pl.*, 2nd ed., Secs. 43, 184.; *Massie* v. *Watts*, 6 Cranch, 148; *Orton* v. *Smith*, 18 How., 263; *Vandever* v. *Freeman*, 20 Tex., 334.

* * * * * * * *

Such a decree, being *in personam* merely, can only be supported against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The Courts of the State might, perhaps, feel bound to give effect to the service made as directed by its statutes. But no Court deriving its authority from another Government will recognize a merely constructive service as bringing the person within the jurisdiction of the Court. The judgment would be allowed no force in the Courts of any other State; and it is of no greater force as against a citizen of another State, in a Court of the United States, though held within the State in which the judgment was rendered. *Hollingsworth* v. *Barbour* 4 Pet., 466, 475; *Boswell* v. *Otis*, 9 How., 336; *Bischoff* v. *Wethered*, 9 Wall, 812; *Knowles* v. *Gas-Light Co.*, 19 Wall, 58, *Pennoyer* v. *Neff*, 95 U. S. 714. See, also, *Schibsby* v. *Westenholtz*, L. R. 6 Q. B. 155; *City of Mecca*, L. R. 6 P. D., 166."

As stated by the Court the statute of Texas authorized constructive service, such as was had in that case. It also provided that, "Where the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass title to such property without any act to be done on the part of the party against whom the judgment is

rendered." *Sayle's Stat.*, vol. I, p. 447, Art. 1338.

This decision in the 110 U. S., was but the application and logical result of a long line of elaborate and thoroughly reasoned opinions of this Court, chief among which is the luminous and comprehensive opinion in *Pennoyer* v. *Neff*, 95 U. S., 714. These decisions have been followed in numerous cases in the Circuit Courts of the U. S., and in the Courts of last resort in the States, and deviation from them, out of fear of the supposed consequences of their unyielding enforcement, will result in greater disaster than it can possibly avert. Now, if a suit to remove a cloud from the title to real estate, is an action *in personam*, then so is an action to quiet title. In fact, this is so self-evident, that opposing counsel expressly concede the same in their brief. We cannot do better here than to quote as a part of our argument, rather than as authority for this Court, from the decisions of the Circuit Courts upon the questions involved. In the case of *Stang* v. *Redden*, 28 Fed. Rep., p. 12, Judge Brewer, in passing upon the validity of a decree, identical with the one here in controversy, obtained under the Kansas statutes, which are substantially the same as those of Nebraska, upon the subject, as will appear hereafter, used the following language:

"A petition for rehearing was presented at the last term. The facts in the case are these: Away back in 1859 or 1860 a man named Russam owned a tract of land in Shawnee County, gave a mortgage, and that mortgage was foreclosed, the property sold, and the sale confirmed, but no deed ever made. By various conveyances from the purchaser at the Sheriff's sale, title passed to Stang. The land was unenclosed and unoccupied. In 1883, Russam, the original owner, (the mortgagor) quit claimed to one McClure. He brought suit in the District Court of Shawnee County against Stang to quiet his title; obtained service by publication, Stang being a non-resident. Upon such service, no appearance having been made, default was taken, and a decree entered quieting his title. After that decree had been entered McClure deeded to Redden. Within a year Stang entered his appearance in that Court obtained an order setting aside the decree, and leave to file an answer. He filed an answer and then re-

moved the cause to this Court. Redden, who purchased after the entry of the decree, and before the order setting it aside, was made a party defendant, and a *cross-bill* was filed by Stang against Redden, charging that he held only the naked legal title in trust. Upon these facts a decree was entered in this Court last term in favor of Stang, adjudging that his was the full equitable title, and that Redden simply held a legal title in trust for him.

Now, after carefully considering the full arguments presented on this rehearing, I see no reason to change the decree. The Supreme Court of the United States have held that a decree like that which was rendered in the suit of *McClure* v. *Stang* was absolutely void, for lack of jurisdiction of the person of the defendant. Being an equitable action, an l equi'y acting only upon the person, and the person not being within the jurisdiction of the Court, that decree must be treated in the Federal Courts as void. *Hart* v. *Sansom*, 110 U. S., 151. Redden purchasing from McClure after that decree, got no higher title—no better title—to the land than he would have had but for the decree. He simply purchased from McClure, who had purchased from Russum, and all that he got was the naked legal title, the full equitable title being in Stang. Counsel says in his brief that Redden purchased upon the advice of Counsel,—advice to the effect that McClure had a perfect title, legal and equitable; and further, in reliance upon the decree,—a decree authorized by the letter of the statute. I do not think the advice of counsel cuts any figure in the case at all. It is not a question of the good faith of the transaction. * * *"

In connection with the foregoing decision and that its significance may fully appear, it may be proper to remark that, as will hereafter be more fully stated, the Kansas and Nebraska statutes, and in fact the statutes of all States, so far as we know, provide that where a judgment affecting real estate has been rendered upon constructive service against a non-resident defendant, the defendant may within a specified time come into court, have the decree set aside and defend the action upon its merits. But the statutes of Kansas and Nebraska also provide that when the land in controversy has been conveyed to a good faith purchaser prior to the set-

ting aside of the decree, that neither the setting aside of the decree or any subsequent proceedings shall affect the title of such purchaser. The Supreme Courts of Kansas and Nebraska further hold that any person who buys land for a valuable consideration from a plaintiff holding under a judgment rendered in his favor in an action to quiet title upon service by publication, is a purchaser in good faith within the meaning of the statutes mentioned.

Again in the case of *Clark* v. *Hammett*, 27 Fed. Rep., 339, the Court says:

"Action in ejectment by the plaintiff to recover certain real estate situate in Marshall county, Kansas. Defendant pleads in bar a decree of this Court in the case of Charles L. Flint against David M. Clark, that said plaintiff and others, quieting the title of said Flint to the land in controversy, and decreeing Clark's title invalid, and barring him from asserting the same; that said defendant holds title to the land under said Flint, etc. To this the plaintiff files a general demurrer.

"It appears from the record of *Flint* v. *Clark*, that Flint held a tax-deed on the land, and that he filed a bill in equity against said Clark and others to quiet his title, and to bar them asserting any claim to the land. In his bill, after seting out his tax-deed, he avers 'that each of the said defendants claims some title, estate, interest in, or lien or claim upon, the lands, by patent from the United States, or through grantors under such patents; and claiming that there are errors and irregularities connected with the issue of said tax-deeds which render the same voidable. * *

* And plaintiff avers that the said estate of defendants was divested by the said tax-deed, and the said claims and pretenses are unjust, inequitable, and unfounded, and tend to the manifest injury of the plaintiff, and to disturb him in the enjoyment of his said estate, and to prevent an advantageous sale thereof.' He therefore prays that his title may be established and quieted, and that defendants, and all persons claiming under them, be forever barred from asserting title, etc. Clark was and is a citizen of Massachusetts,' and service of process was made on him by publication in a newspaper, under the Act of Congress of March 3, 1875. He

made no appearance, and a decree was entered as prayed for. This question goes to the jurisdiction of the Court to make such decree on service by publication.

The statutes of Kansas authorize such a suit and such a service. Stat. 1879, Code, Par. 72, p. 594. The Act of Congress of March 3, 1875, authorizes such service in suits pending in this Court, to remove any incumbrance or lien or cloud upon the title to real or personal property within the district. when one or more of the defendants shall not be an inhabitant of, or found within, the district, etc. It will be observed that this act does not, in terms, authorize such service in suits to *quiet title*, but it is difficult to perceive wherein such a suit is not as much a proceeding *in rem* as a suit to remove a cloud. On the other hand, I think it must be conceded that if a suit to remove a cloud is a suit *in personam*, a suit to quiet title must be held as coming under that class. The Supreme Court has decided that a suit to quiet title, in a case like *Flint* v. *Clark* is maintainable on the equity side of this Court when the defendant is in Court. *Holland* v. *Challen*, 110 U. S., 15; *Reynolds* v. *Bank*, 112 U. S., 405. It is unnecessary to cite authorities to sustain the rule of law that no personal judgment can be rendered against a party, unless he has been served with process or makes voluntary appearance, nor is it necessary to cite authorities to the other rule that an adjudication *in rem* can be made when the Court has obtained jurisdiction of the *res* without personal service of process on the person. It would follow if the suit by Flint to quiet his title was a proceeding *in personam*, and not *in rem*, the decree of the Court, so far as it sought to adjudicate and bar Clark's title to the land, was *coram non judice*, and void. The Supreme Court of the United States has declared that a suit to remove a cloud from the title to real estate is a proceeding *in personam* (*Hart* v. *Sansom*, 110 U. S., 151) and that jurisdiction of the person is necessary to make a decree.

"As before stated, if a suit to remove a cloud is a personal action, I think it must be conceded that a suit to quiet title is likewise. There is no seizure or taking of the property by the Court, nor any decree for its sale, or for any act or thing to be done in regard to the thing itself, which is required to

make it a proceeding *in rem*. *Pennoyer* v. *Neff*, 95 U. S. 714. The proceeding appears to be directed against the person. It is true it does not seek to compel him to execute a release of his pretended title, but rather seeks to enjoin and bar him, and all persons claiming under him from asserting any title or interest in the land. In *Hart* v. *Sansom*, *supra*, the Court says: 'Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the Court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. * * It has no inherent power by the mere force of its decree, to annull a deed or establish a title.'

"Believing, as I do, that the Supreme Court has established the rule of law applicable to this case, it is not necessary for me to discuss it as an original proposition, or to refer to the general views presented by the defendant's counsel, or by Mr. Justice Hunt in his dissenting opinion in *Pennoyer* v. *Neff*, however much of reason they might present to my mind if the question was not *stare decisis*.

"The plaintiff's demurrer must be sustained."

It may incidentally be noted that the plaintiff in the action to quiet title referred to in the opinion just quoted, is the same individual who obtained the decree in controversy—Charles L. Flint.

In the opinion of the Court in *Pitts* v. *Clay*, 27 Fed. Rep., 637, a case arising under the laws of Iowa, the Court, in passing upon the validity of a decree quieting title in all respects identical with the one in question, says: * *

"It is further contended, on behalf of defendants, that complainant is barred in this action by reason of a decree rendered by the Circuit Court of Sioux County, in a proceeding brought to quiet title against one McConaughy, through whom complainant derives title. The petition in that cause was filed December 10, 1873, at which time the title had passed from the United States to Williams, and from the latter to McConaughy. The evidence shows that McConaughy was a non-resident of Iowa; that the only notice given of the pendency of the suit in said Circuit Court was by pub-

lication in a newspaper in said Sioux County; that there was no appearance in that cause for defendant, the decree being rendered upon a default, and is to the effect that the petitioners in that cause were the owners of the land; and that the defendant was forever barred from asserting any right or title to the land. The question arising from this state of facts is whether McConaughy and his grantee are bound by a decree of this nature, rendered by a default, upon service by publication only. I am not able to distinguish this case from that of *Hart* v. *Sansom*, 110 U. S., 151; and following the ruling therein made, I am compelled to hold that the decree in question is not a bar to the present suit."

The laws of Iowa in regard to constructive service, the rendering and opening of default judgments, the effect of conveyances before such judgments are opened and the quieting of title to real estate, are the same as those of Nebraska, with the exception that in the former State, default judgments can only be opened within two years, while in the latter they can be vacated within five years. See *Miller's Iowa Stat.*; p. 661, Sec. 2618; p. 719, Sec. 2877-8; and p. 802, Sec. 3274-5.

Plaintiff in error seeks to evade the foregoing decisions, and to do so, argues that the action to quiet title under the statutes of Nebraska, has been changed into an action *in rem*. It is conceded that, under the old chancery practice, an action to quiet title is an action *in personam* and not an action *in rem*, and that a decree quieting title to real estate, obtained in such an action against one residing beyond the jurisdiction of the Court where the decree is rendered and where no appearance is made by defendants, is absolutely void and subject to collateral attack.

Before setting forth the statutory provisions, which it is claimed, have transformed the action from one *in personam* to one *in rem*, it is hardly necessary to suggest that if an action *in personam* is to be changed by a legislature into an action *in rem*, such change cannot be effected simply by the legislature, calling it an action *in rem*, or assuming to treat it as such. The change if made, must be by making a substantial change in the character and nature of the proceedings.

The statutory provisions which plaintiffs in error claim have worked the change in the nature of the action transforming it from one *in personam* to one *in rem*, are found in the brief of opposing counsel, and need not be set forth here. Now the most that can possibly be said of them is that the legislature of Nebraska have, in their legislation, acted upon the theory that an action to quiet title is an action *in rem*, and even this is not certain.

The statute, in regard to constructive service, makes no direct reference to actions to quiet title, but as it is broad enough in its terms to cover such actions, it may be presumed that they were in the mind of the legislature, and therefore that the legislature considered such actions proceedings *in rem*. This is the only one of the statutory provisions quoted which even implies that actions to quiet title are regarded by the legislature of Nebraska in any other light than actions *in personam*.

But an action *in personam* would not be changed into an *action in rem* by the mere passage of an act by a legislature, authorizing constructive service as against non-resident defendants. Yet such seems to be the idea of plaintiffs in error. If such were the case, constructive service alone, would be sufficient in all actions in which it ever was, or ever might be, authorized by legislative enactments, because all such actions would become actions *in rem* by virtue of such legislative enactments. If the Federal Courts are limited in their determination of whether proceedings in state courts, are in violation of constitutional rights, to the investigation of the question whether such proceedings are in accordance with acts of the legislature and decisions of state courts thereunder, the functions of the federal judiciary would certainly be greatly abridged. State legislatures certainly ought to, and do have very great control over lands, and the titles thereto, within their State limits, and so long as they do not trespass upon constitutional limitations, their control over such matters is supreme. But in questions pertaining to lands and titles thereto within their territorial limits, the States are just as much subject to constitutional restrictions as in regard to other matters.

Section 57 Ch. 73 of the Nebraska statutes, provides in

substance, that actions to quiet title may be brought by any one, whether in actual possession of real estate or not, to quiet his title thereto against any one claiming an adverse interest therein. Certainly nothing in this section—of which we shall have more to say hereafter, changes the nature of the action from one *in personam* to one *in rem.* Neither is there anything in section 58 of ch. 73, to effect such a change. In short, there is nothing in any of the sections referred to, which dispenses with the necessity of having the defendant in court by personal service within the jurisdiction of the court. If the parties are in court and conveyances are ordered and not made, the decree may stand in their stead. If the parties *are in court*, it is then immaterial whether the plaintiff is in possession of the land or not. But a court cannot bar and perpetually enjoin a defendant over whose person it has not obtained jurisdiction, from asserting title to his land, in an action where there is no seizure of the land or equivalent act, and where the plaintiff is not and never has been in possession of the land and has no title whatever thereto, and when the defendant has never created any lien or executed any contract touching the premises. Merely making an action a statutory proceeding, does not of itself change the essential nature and character of the action. If under the chancery practice, an action to quiet title is an action *in personam*, then a statute allowing such an action but not changing the essential character of the procedure, or the relief to be obtained, does not make it an action *in rem.* Can it be, if, without a statute, it is impossible to obtain a valid decree quieting title against a non-resident upon merely constructive service, because to do so would be to deprive him of his property without due process of law, that, with a statute providing for obtaining such a decree upon such service, such a decree will be valid? If so, the legislatures are the supreme judges of what is "due process of law," and the 14th amenmdment to the constitution is no limitation on the States. In other words, is everything which is authorized by statutes, "due process of law?"

Opposing counsel cite in their brief what purports to be the opinion of Justice Miller in overruling a motion to remand an action to quiet the title to the premises in controversy.

In regard to this we say that the opinion mentioned, was given orally, and as printed, varies quite materially from our recollection, of what the learned Judge actually said. However, the case was not then being heard or decided upon its merits. The decision was merely that there was a federal question involved, and therefore that, as the amount involved exceeded $2,000, the circuit court had jurisdiction of the case. Justice Miller explicitly disavowed expressing his final opinion as to the validity of the proceeding in question.

In the unreported case of *Leitzback* v. *May*, which was heard in the circuit court of the U. S. District of Kansas, in 1885, before Justice Miller, a decree in all respects similar to the one in controversy, obtained upon constructive service under the Kansas statutes, which, upon this subject, are in all material subjects—except that plaintiff must be in possession—the same as those in Nebraska, was held invalid, and the title obtained under it worthless.

By the Kansas code, p. 680, Sec. 591, Dassler's, Stat. it is provided that: "An action may be brought by any person in possession by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse estate or interest."

By Sec. 400 of the said code, p. 654, it is provided that: "When a judgment shall be rendered for a conveyance, release or acquittance, in any Court of this State, and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment, or the Court may order such conveyance, release or acquittance to be executed in the first instance by the Sheriff; and such conveyance, release or acquittance, so executed, shall have the same effect as if executed by the party against whom the judgment was rendered. This section shall apply to decrees rendered or to be rendered in suits now pending."

By sec. 77, of same Code, it is provided that, "A party against whom a judgment or order has been rendered with-

out other service than by publication in a newspaper, at any time within three years after the date of the decree or order, have the same opened, and be let in to defend the same. But the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before the judgment under an attachment. * * *" The Courts of Kansas have held (as have also those of Nebraska under a similar statute of that State) that any one who has paid a valuable consideration for land, the title to which depends upon a judgment on constructive service, is a "purchaser in good faith" within the meaning of the last section quoted, and that his title cannot be affected by any after proceedings brought to open the judgment.

Howard et al., v. *Entreken*, 24 Kan. 428;
Watson v. *Ulbrich*, 18 Neb. 186.

Therefore, if the premises have been sold, opening the judgment is of no avail as against the purchaser.

If such a title, in the hands of a good faith purchaser, is held bad it is only because the decree was void when rendered. As will be seen, the case decided by Justice Miller was an ejectment suit brought in the U. S. Circuit Court. The plaintiff had the patent title. The defendant claimed the land under a series of convevances which depended upon a decree obtained by the first grantor, in the chain of title, quieting his title as against the plaintiff in the ejectment suit. This decree quieting title was obtained upon constructive service alone. After this decree was rendered, the plaintiff in the ejectment suit went into the State court, opened up the decree and had it reversed, but as the land had been several times sold and transferred the reversal was of no avail. Relief in the State Courts was impossible. The suit in ejectment in the U. S. Circuit Court was instituted. The defendant in the ejectment suit plead in bar the decree and the subsequent transfers of the land thereunder. This plea would have been good in the State Court or any other Court which recognized the validity of such a decree against a non-resident upon constructive service. Justice Miller, however, after finding the

facts as stated in our summary of them, held that the plaintiff in the ejectment suitwas entitled to judgment and that the decree and transfers were no bar to his action. As the case is not in the printed reports, is exactly in point, and an attempt has been made to raise a doubt as to Justice Miller's position, we quote, in the form of an appendix to this brief, the finding of facts and law made by Justice Miller and the judgment in the case as they appear upon the record.

It will be observed, by the sections above quoted, that in Kansas the action to quiet title, is just as much a statutory one as in Nebraska. And here we call attention to the fact that not only do the laws of Kansas require that a plaintiff, in an action to quiet title, must be in possession of the land, but in the case of *Leitzback* v. *May*, mentioned above, the record shows that the plaintiff in the original case, was in possession of the premises in question at the time of the commencement of the action; yet notwithstanding this latter fact, Justice Miller declared the decree rendered upon constructive service, to be void. In the present action however, the plaintiff in error asks this Court to hold a decree valid which is based only upon constructive service, notwithstanding Flint was never in possession of the land in question, and was not even in the State to verify his petition. And we also here call attention to the fact that the case of *Hart* v. *Sansom*, 110 U. S., 151, was also purely a statutory action, and the judgment rendered in it, was based entirely upon statutory law.

In Texas, all questions of title are tried under the chapter of the statute entitled, "Trespass to try title." *Sayle's Tex. Stat.*, 2nd ed., Title 96. Under this action, all questions of title may be tried, and it is immaterial whether the cause of action or defense be legal or equitable.

Grimes v. *Hobson*, 46 Tex., 416;
Dangerfield v. *Paschal*, 20 id., 537.

The owner of land has such seizen by reason of his title, whether legal or equitable, as will support an action of trespass to try title; and he may elect to consider himself ousted, and bring suit against an adverse claimant of the land, even

though such claimant has never been in actual possession of it.

Titus v. *Johnson*, 50 T., 224.
Johnson v. *Byron*, 62 id., 623.
Neil v. *Keese*, 6 id., 23.

Section 4786 of the Texas Statutes above cited, declares what the petition shall contain, and under its provisions the issues presented are the same, in quieting title, as under the Nebraska Code.

Section 4790 declares that "The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied."

Section 4808 declares that "Upon the finding of the jury, or of the Court, where the case is tried by the Court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant, the title, or possession, or both, as the case may be, of such premises, describing them, and, where he recovers the possession, that he have his writ of possession."

Section 4811 declares that "Any final judgment rendered in any action for the recovery of real estate hereafter commenced shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through or under such party by title arising after the commencement of such action."

Section 1338 declares that "Where the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass the title to such property without any act to be done on the part of the party against whom the judgment is rendered."

From the foregoing references to the Texas statutes, it will be seen that if there is anything in those of Nebraska to make an action to quiet title an action *in rem*, and a decree therein upon constructive service, valid, then the action in which the decree, passed upon in *Hart* v. *Sansom*, was also one *in rem*, and said decree was also valid. But this Court held otherwise, and we think beyond question properly. In Nebraska the action to quiet title is no more statutory than the

corresponding action of "trespass to try title" in Texas, and the provisions of the two States relating to the two actions are substantially the same.

Opposing counsel cite Pomeroy on Equity Jurisprudence, as authority for the proposition that many States have, by statutory legislation, abrogated the original doctrine that equity actions were actions *in personam*, and have caused decrees to become and operate *in rem*, and call attention to the fact that Pomeroy in a foot note, classes Nebraska among such States. Counsel, however, fail to mention the fact that Pomeroy also classes Texas along with Nebraska with such States. This omission is doubtless due to the fact that this Court in *Hart* v. *Sansom*, without a dissenting opinion, differed with the doctrine laid down by Pomeroy. We think he rather misstates or overstates the effect of these statutes. We submit as before stated, that these statutes at most, merely indicate that the legislatures of certain States have regarded equity actions as being *in rem*, and have passed laws on that assumption. At any rate, it is certainly indisputable that, in order to make such actions as those to quiet title and remove cloud from title, actions *in rem*, something more must be done than for the legislatures to say that decrees in such actions shall establish titles, or in other words, something more must be done by the legislatures than merely to say, for that is what it amounts to, that henceforth actions to remove cloud from title and quiet title shall be actions *in rem*.

If it is necessary to attach or levy upon real estate before a valid judgment upon constructive service can be rendered against a non-resident upon which the interest of such non-resident in such real estate can legally be sold, then we cannot see how the entire interest of a non-resident in his real estate can be divested in a proceeding in which he does not appear, and of which he has no actual notice, where there is no seizure of or levy upon it, which is not and never has been in the possession of the plaintiff, and where the only attempt at service is by publication of a notice in a newspaper. If "due process of law" forbids the one, it certainly does the other. The mere fact that the real estate is within the territorial limits of the Court's jurisdiction, does not give the Court jurisdiction of the property in one case any more than

the other. Something more must be done to make it subject to the control of the court. There must be some outward and visible act *done by the court* through its proper officer, to indicate its dominion and power over the property.

Pennoyer v. *Neff*, 95 U. S. 714;
Eaton v. *Badger*, 33 N. H. 228.

We submit that from the foregoing, it plainly appears that this court has in the case of *Hart* v. *Sansom*, adjudicated the question presented in the certificate of division in favor of defendant in error; and that a decree barring a non-resident from asserting title to his land, when obtained by one not in possession of the land upon constructive service in an action in which such non-resident does not appear and of which he has no actual notice, is void and statutes authorizing such decrees and proceedings to enforce them, are in contravention of the 14th amendment to the federal constitution.

It certainly needs no argument to establish the proposition that, if the decree in question was and is void as against the non-resident Hurley, it is void as against his grantee Griggs, a resident of Nebraska. "The judgment, if void when rendered, will always remain void;" it cannot occupy the doubtful position of being void, if the land remains in the hands of Hurley or some other non-resident, but of being valid, if transferred to a resident of Nebraska. Such an idea is absurd. To so hold would be to give some efficacy to the judgment, even as against Hurley. It would so restrict his right of alienation as to limit him to selling only to non-residents of Nebraska. More than this, upon the theory which opposing counsel urge, the decree might be void as against Hurley, so long as he remained a non-resident of Nebraska, but good if he chanced to take up his residence upon his land in question.

Believing as we do that the question presented in this case is directly decided in the case of *Hart* v. *Sansom*, we deem it unnecessary to refer at length to the decisions and arguments presented by opposing counsel. We might remark, however, that the case of *Huling* v. *The Kaw Valley Railway* was one to condemn property for a public use,

under the right of eminent domain, and can afford no precedent for the decision of this case. As to the decision of the supreme court of the State of Kansas, in *Dillon* v. *Heller*, a considerable portion of which is quoted in brief of opposing counsel, we say that it is undoubtedly contrary to the decision of Justice Miller before referred to, and also to that of Justice Brewer in the case of *Strang* v. *Redden* above cited. But it is to be noted that in this case of *Dillon* v. *Heller*, the court base their opinion that the decree is valid, entirely upon the fact that the plaintiff, when he commenced the action, was a *resident* of Kansas and in *actual possession* of the land. The court repeatedly emphasize the necessity of the plaintiff's being in actual possession of the land, in order to maintain the suit under the Kansas Statute. As opposing counsel have quoted so largely from this opinion, we think it only fair to this Court to give this additional quotation therefrom: "In the present case the plaintiff resides within the State of Kansas, and he virtually surrendered jurisdiction of himself to the Court below when he commenced this action. He is in the *actual possession* of the property in controversy, and, *being in actual possession* thereof, he also, in effect surrendered jurisdiction thereof to the Court when he brought his action, and as much jurisdiction thereof as any Court in any action could obtain by virtue of a seizure of the property by its own officers; and service of summons by publication, as authorized by law, was afterwards had in this case; and this gave the Court the power to hear and determine the case, and to render a judgment thereon and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy." The syllabus in this case, written by the Court under the statutes in Kansas, is as follows: "In an action to quiet title to real estate, brought by a party *in the actual possession* of such real estate against a person who is a non-resident and out of the State, service of summons may be made by publication and such service will give the court ample jurisdiction to hear and determine the case." From the foregoing, it is evident that the supreme court of Kansas upheld the decree in question, only because the plaintiff in the suit in which it was rendered, was in the actual possession of the

land when the suit to quiet title was commenced; and that it would not have upheld a decree obtained by one not in actual possession. The court acknowledge the necessity of a seizure of the property in order to make the action one *in rem* and constructive service sufficient, but hold that the fact of the plaintiff's being in the *actual possession* of the land, when he comes into court, is substantially equivalent to a seizure by the court's officers and meets the requirement therefor. This idea is the same as that suggested by Justice Miller in his opinion the purported copy* of which is set forth in opposing brief. Without discussing the merits of this doctrine, it is sufficient to say that it is fatal to the decree in question, as the plaintiff in the action in which it was rendered, was not at any time in possession of the land in controversy, had no title whatever thereto, and was not even a resident of Nebraska.

These observations naturally lead to the discussion of another point which renders the decree in question invalid, even under the decisions and statutes of Nebraska, without regard to the questions of due process of law and the nature of the action. Notwithstanding the language of sec. 57, chap. 73, Comp. Stat. of Nebraska, 1885, p. 483, which is quoted in brief of plaintiff in error, the Supreme Court of Nebraska, in several decisions have declared that the action to quiet title could only be maintained by one in the actual possession of the land, or who had the legal title thereto.

The Supreme Court of Nebraska in *State of Nebraska* v. *R. R. Co., et al*, 7 Neb., 357, discuss the action to quiet title as it exists under the statutes of that State, and decide that "whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title in order to maintain the action"—376. The statute is construed to permit the action to be maintained only by one in *actual* possession, or by one in *constructive* possession, *i. e.*, having the legal title. This construction is again placed upon the statutes in *Gregory* v. *Lancaster Co. Bank*, 16 Neb., 411. In *Snowden* v. *Tyler*, 21 Neb., p. 215, the Court say: "The first objection made by the defendants is, that the proper

*We do not claim that opposing counsel intend to misstate Justice Miller's remarks, but are confident that whoever reported him, did not get what he said accurately.

remedy of the plaintiffs was by an action of ejectment, and that a Court of equity has no jurisdiction in the first instance to determine purely legal titles to land where the plaintiff is out of possession. In other words, when the real estate is in possession of another the proper remedy of one claiming the legal title is an action of ejectment. *Gregory* v. *Lancaster Co. Bank*, 16 Neb., 411. It is true, and had the defendants, either by demurrer or answer, raised an objection to the jurisdiction of the Court, the decree would be reversed."

It will be observed that all of the Nebraska authorities above cited—except the last one—were decided long prior to the date of the purchase of the land in question by defendant in error; that, as to the decision lastly cited, it was based upon a trial in the court below, had in 1884, or fully two years prior to the date of the purchase by such defendant in error; and that therefore, at the date of such purchase, it was the settled rule of the Supreme Court of Nebraska, that the courts of that state had no right to entertain suits to quiet title, in case the plaintiff were not in possession of the premises in question. And this rule, we submit, was a rule of property upon which the defendant in error had a right to rely when he made the purchase in question, and we further submit that this court is bound by the rule thus laid down.

Opposing counsel lay some stress upon the fact that to hold the Flint decree invalid, would work a hardship. To this we say that though this may be true, to a limited extent, a still greater hardship would be the result of sustaining it. Consider what the record discloses in this case: Flint got a void tax-deed upon land worth about $4,000—Rec. 1—paying therefor the sum of $47.38—Rec. 4. Attorneys Ricketts and Wilson got for him the decree in question—Rec. 5-6. Hurley was not in the State and knew knowing of the pro ceeding—Rec. 13. Said attorneys obtained a decree—Rec. 8—declaring Flint to be in possession and the owner of the land, said assertions being both false—Rec. 13. Flint then conveyed his interest in the premises to the very attorneys who had secured the false decree—Rec. 2, 14—who in turn conveyed to one of the plaintiffs in error—Rec. 14. To stay the judgment rendered in this action and to carry this case to this court, the said at-

torneys alone execute the necessary bond—Rec. 16. And now they appear in this court as counsel for plaintiffs in error, and not only insist that the false and robbing decree they themselves had secured, shall be held valid, but actually would have it understood that defendant in error was guilty of such a wrong in purchasing from Hurley and attempting to overturn the iniquitous decree, as to deprive him of all rights at the hands of this court. Comment would be superfluous.

Let us look at the consequences both of holding such decrees valid and invalid. In the first case, title would be divested in defiance of law and justice, non-residents would be robbed of their property by means of the publishing of notices in obscure newspapers, without a possibility of redress, and wrong-doers would be allowed to profit by their own trickery. In Nebraska a non-resident might even be in actual possession of his land by tenant, and yet have his property taken from him without his knowledge, by means of such constructive service, there being no provision in the statute requiring any notice to the one upon the land, but only to the one as against whom the relief is prayed.

In the second case, while a purchaser might lose the land purchased, he would have his remedy back upon his grantors, and, in addition, could recover from the successful claimant the value of his improvements and the amount of all taxes paid by him with heavy interest thereon. This is the law in Nebraska—Stat. Chap. 63—and is also in nearly, if not all, of the other States in the Union.

We therefore submit that the decision of the court below was correct. Respectfully submitted,

NATHAN K. GRIGGS,
SAMUEL RINAKER,
JULIUS A. SMITH,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, ss:

At a term of the Circuit Court of the United States for the District of Kansas, begun and held at the city of Leavenworth in said district on Monday, the first day of June, 1885.

Present, HON. SAMUEL F. MILLER, Circuit Justice,
HON. DAVID J. BREWER, Circuit Judge,
J. R. HALLOWELL, U. S. Attorney,
B. F. SIMPSON, U. S. Marshal,
A. S. THOMAS, Clerk.

Proceedings were had as follows, to-wit:

Friday, June 5, 1885.

NICHOLAS LEITZBACK, *Plaintiff*,)
vs.) ss
L. C. MAY, *Defendant*.)

Now on this 5th day of June, A. D. 1885, at the June term 1885 of this court appeared the said plaintiff by Almerin Gillett, his attorney, and the said defendant by L. W. Keplinger, his attorney, and this cause coming on for trial, and a jury having been waived by a written stipulation on file signed by the attorneys of the said parties, the said cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel for the said parties finds the facts as follows, to-wit: That said plaintiff is and was at the commencement of the suit, the owner of the said land in controversy by a title in fee simple absolute, and had been such owner ever since the 28th day of April, A. D., 1879, and said plaintiff was during all that time entitled to the possession of said land unless his said title and right of possession have been debarred by the matters and things hereinafter found. That said defendant has kept the said plaintiff out of the use and possession of the said premises ever since the fore part of January, A. D., 1882, and that the value of the use and rents and profits of said premises during that time is $840. That the value of the said land is the sum of $5,100. The further matters relied upon by said defendant to defeat the said plaintiff's right of recovery are as follows, viz: On April 27th, A. D., 1881, one Allen H. Jackman filed in the district court of Allen County, Kansas, his petition against this plaintiff of which the follow-

ing is a copy, viz: "In the district court of Allen County, State of Kansas. Allen H. Jackman, plaintiff, vs. Nicholas Leitzback, defendant. Petition to quiet title. The said Allen H. Jackman, plaintiff, complains of said Nicholas Leitzback, defendant, for that the said plaintiff has the legal title to and is in the peaceable possession of the following real estate, situate in the said county of Allen, and described as follows, to-wit: A part of the south half of section nine, in township twenty-six, range eighteen east, commencing at a point in the center line of said section twenty-five chains west of the quarter section corner on the east side of said section, thence south nine and thirty-six one-hundredth chains, thence west ten chains, thence south fifteen chains to the hedge fence, thence west to the west bank, Neosho river, thence northerly along the west bank of said river to a point due west of the place of beginning, thence east to the place of beginning containing seventy acres more or less; and the said plaintiff further saith that the said Nicholas Leitzback sets up and claims an estate and interest in and to the said premises averse to the estate and interest of the said plaintiffs so as aforesaid averred. The said plaintiff therefore prays that the said Nicholas Leitzback may be compelled to show his said title and that it may be determined to be null and void as against the said title of the plaintiff. G. P. Smith, attorney for said plaintiff. On the said 27th day of April, 1881, there was filed with said petition an affidavit of said plaintiff under the law of the state of Kansas, for the purpose of enabling said plaintiff to make service on said defendant by publication in a newspaper which is in words and figures following to-wit: State of Kansas, Allen county, ss. Allen H. Jackman, being first duly sworn deposeth and saith that he is the plaintiff in the above entitled action. That he is about to file his petition in said action against the said Nicholas Leitzback, defendant, in which he sets up that he has the legal title to and is in the peaceable possession of certain real estate in Allen county, Kansas, and described in said petition, and that the plaintiff sets up and claims an estate and interest in and to said real estate adverse to the estate and interest of plaintiff therein, and praying that the said defendant be compelled to show his said title, and that

the same be determined to be null and void as against the said title of plaintiff; and the said plaintiff further saith that the said Nicholas Leitzback is a non-resident of the state of Kansas and that service of summons cannot be had upon him within this state—and the said plaintiff wishing to obtain a service on the said Nicholas Leitzback by publieation. Allen H. Jackman. Subscribed in my presence and sworn to before me this me the day of April A. D. 1881, J. Bond, J. P. That thereafter the said District Court of Allen County, Kansas, without any other service than by publication in a newspaper according to the State law of Kansas, rendered a decree in said cause one June 23, 1881, in words and figures following, to-wit:

State of Kansas, Allen county, ss. In the district court of Allen County, State of Kansas, June term, 1881, fourth day. Present H. W. Talcott, judge; I. H. Walters, sheriff; Wm. Davis, clerk. Title of cause. Allen H. Jackman, plaintiff, vs. Nicholas Leitzbach, defendant. Journal Entry. And now this cause coming on to be heard by the court this fourth day of the June term, 1881, of this court, the plaintff appeared in person by his attorney, and the defendant appearing not, and being in default of answer or appearance of any kind, and it appearing to the court that the said defendant, Nicholas Leitzbach, is a non-resident of the state of Kansas, and that service of summons could not be had upon him personally within this state, at the time of the commencement of this action and that due and legal service was had upon said defendant of the commencement and pendency of this action by publication, the proof of which is on file in this Court, having been examined and approved by the Court, and it appearing also to the Court, from the evidence offered by the plaintiff that he was in the quiet and peaceable possession of the premises described in his petition in this action, at the time of the commencement of this action, and that he is still in said possession; and it appearing also that said plaintiff is siezed in fee simple of the said premises in manner and form as the said plaintiff hath set up in his said petition, and that defendant hath no title in or to said premises, adverse to the title of plaintiff, it is therefore considered, ordered and adjudged by the Court here, that the said plaintiff, Allen H. Jack-

man, is the owner of, and has the legal title to, and is entitled to the possession of the premises described in his said petition situate in the County of Allen and State of Kansas, and described as follows, to-wit: That part of the south half of section nine, in Township twenty-six, Range eigtheen east, commencing at a point in the center line of said section, twenty-five chains west of the quarter section corner on the east side of the section; thence south nine and thirty-six one-hundredths chains; thence west ten chains; thence south fifteen chains to the hedge fence; thence west to the west bank of the Neosho River, thence northerly along the west bank of the Neosho River to a point due west of the place of beginning, thence east to the place of beginning, containing seventy acres, more or less; and that the said defendant, Nicholas Leitzback has no title or interest, legal or equitable, in or to the said above described premises, as against or adverse to the said title of the said plaintiff, and that the said title of plaintiff in and to said premises be, and the same is hereby forever quieted and confirmed as against any and all claims of title to said premises, or interest therein by the said defendant, and against any and all persons hereafter claiming title thereto, or interest therein, through or under him. That plaintiff pay the costs of this action taxed at $10.65. H. W. Talcott, Judge. State of Kansas, County of Allen, ss. I, William Davis, clerk of the District Court within and for said County and State above named, do hereby certify that foregoing is a true, full and correct copy of the judgment, in the case of Allen H. Jackman v. Nicholas Leitzback, as the same appears of record in my office.

[Seal.] In testimony whereof I have hereunto set my hand and affixed the seal of said Court, this 29th day of June A. D. 1881. Wm. Davis, clerk.

That said Nicholas Leitzback was and at all times has been a citizen of Litchfield in the state of Connecticut and a citizen of said state of Connecticut, and had no knowledge of the existence or pendency of said proceedings until the 20th day of August A. D. 1881, and that on August 31st, 1881, he by his counsel appeared in said court and filed a motion to have said decree opened and be let in to defend. He also filed at said time his full answer to said petition, and

his affidavit, that he had had no notice or knowledge of the existence or pendency of said suit. That such proceedings were thereafter had in said cause, that on January 3d, 1882, the said court vacated said decree and allowed said Leitzback to defend in said suit, which he did to such effect that a final decree was at the November term 1882 of said court, rendered in favor of said Leitzback and against said Allen H. Jackman, decreeing that said Leitzback was the owner of said land and that said Jackman had no title thereto; that on the 30th day of June A. D. 1881, said Allen H. Jackman and Gertrude his wife executed a warranty deed of said land to H. G. Jones, said deed was duly acknowledged and was filed for record in the office of the register of deeds of Allen County, Kansas, on the 28th day of July, A. D. 1881, said deed receipted a consideration of $3200.00; that on July 27, 1881, said A. G. Jones and wife executed a quit claim deed of said land to Samuel Caldwell, which deed was duly acknowledged, and was registered in the office of the register of deeds of Allen County, Kansas, August 22, 1881, and on Fedruary 9, 1882, Samuel Caldwell executed a warranty deed to said L. C. May of the lands in controversy in this suit, which deed was duly acknowledged, receipted a consideration of $3500.00, and was duly recorded in the office of register of deeds of Allen County, Kansas, on February 28, 1882. As conclusions of law the court finds that the plaintiff Nicholas Leitzback was at the commencement of this suit, and now is the owner of the said land mentioned and described in his said petition, and is entitled to recover the possession of the same together with the said sum of eight hundred and forty dollars ($840.00) his damages for the unlawful detention of the same and his costs of this suit.

SAMUEL F. MILLER, Judge.

NICHOLAS LEITZBACK, *Plaintiff*,)
4412. VS.
L. C. MAY, *Defendant*.)

It is therefore adjudged by the court that said plaintiff Nicholas Leitzback do have and recover of and from the said defendant L. C. May, the possession of the said land in his petition mentioned, to-wit: That part of section 9, township 26, range 18, bounded as follows, to-wit: Commencing